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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 5

LOUIS COMPAGNA AND CHARLES GIOE, PETITIONERS

v.

WILLIAM H. HIATT, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 242–250) and its opinion and order denying motions for reconsideration of its judgments (R. 253–254) are reported at 82 F. Supp. 295. The majority (R. 269–277) and dissenting (R. 277–278) opinions in the Court of Appeals and that court's *per curiam* opinion and order denying a petition for rehearing (R. 285) are reported at 178 F. 2d 42.

JURISDICTION

The judgment of the Court of Appeals was entered on November 10, 1949 (R. 279) and a

petition for rehearing (R. 281–283) was denied on December 16, 1949 (R. 285). The petition for a writ of certiorari was filed on January 12, 1950, and was granted on May 15, 1950 (R. 287). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a prisoner held under a judgment of conviction, following his arrest as a parole violator and the revocation of his parole, is required to show, as a condition of his discharge on habeas corpus, that the revocation of parole is null and void, or whether it is sufficient that the court find that the warrant under which he was arrested as a parole violator was issued by the Board of Parole without information of parole violation.

2. Whether a parolee who is retaken under a parole-violation warrant is entitled to a formal hearing before the Board of Parole, including the right to counsel, to produce witnesses, and to cross-examine opposing witnesses, before his parole may be validly revoked.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 93–107.

STATEMENT

Petitioners Louis Compagna and Charles Gioe are two of a group of defendants who were convicted in 1943, in the District Court for the

Southern District of New York, of violating the Federal Anti-Racketeering Act of 1934 (18 U. S. C. [1940 ed.] 420a) by conspiring to extort upwards of $1,000,000 from the motion picture industry (R. 39, 43–46).[1] Each was sentenced to ten years' imprisonment and to pay a fine of $10,000 (R. 39). Their convictions were affirmed by the Court of Appeals for the Second Circuit, and this Court denied certiorari (R. 29; see *United States* v. *Compagna,* 146 F. 2d 524, certiorari denied, 324 U. S. 867).

1. On August 13, 1947, having served in excess of one-third of their prison sentences (see 18 U. S. C. [1946 ed.] 714, Appendix, *infra,* pp. 93–94), petitioners were released from Leavenworth Penitentiary on parole (R. 28, 38, 42). The paroling of petitioners (and of two of their convicted co-defendants, including Paul De Lucia, the respondent in No. 163, this Term, see fn. 1, in the margin) was followed by unfavorable newspaper publicity in Chicago, and a subcommittee of the House Committee on Expenditures in the Executive Departments was appointed to investigate the operations of the United States Board of Parole, particularly in so far as they affected these parolees'

[1] Paul De Lucia, the respondent in No. 163, this Term, pending on petition for a writ of certiorari, was also a defendant in this prosecution (R. 43). One of the issues presented in the case at bar—the first "Question Presented," *supra*—is closely related to, though not identical with, the issue presented in the *De Lucia case.* See pp. 13–16 of our petition for certiorari in that case; see also pp. 37–49, *infra.*

cases.[2] Extensive hearings were held by this subcommittee in Chicago and Washington beginning in September 1947 and continuing to June 1948.[3] The printed transcript of the hearings held up to March 11, 1948, was received in evidence in the habeas corpus proceedings here involved (see R. 152, 163–164, 260) and is on file as an original exhibit in this Court. The transcript of these hearings indicates that members Rogers and Monkiewicz of the Board of Parole testified before the subcommittee that the Board was unaware of any instances of parole violation by petitioners up to the dates of their testifying.[4]

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[2] See *Seventeenth Intermediate Report of the Committee on Expenditures in the Executive Departments*, entitled "Investigation as to the Manner in which the United States Board of Parole is Operating, &c.," dated June 19, 1948 (H. Rep. No. 2441, 80th Cong., 2d sess.), p. 1. This report was attached to and made a part of the petitions for writs of habeas corpus which gave rise to the instant proceedings (see R. 2, 3, 25). Portions of the report are quoted in the petitions (see R. 3, 4, 5, 6, 25), but the report is not reprinted in its entirety in the record.

[3] The subcommittee sat on September 25 and 26, 1947, February 16, 17, 18, March 1, 2, 3, 4, 9, 11, and June 7, 1948 (see title page and p. 2 of the *Seventeenth Intermediate Report*, &c., cited in fn. 2, *supra*.

[4] Board member Fred S. Rogers, testifying on March 3, 1948, stated (Hearings, p. 573): "These men [petitioners and two of their convicted codefendants who had also been granted paroles, including De Lucia, the respondent in No. 163, this Term] have been out for 6 months, and there has not been a single report of an infraction of a rule of society against them. * * * We have the FBI that has watched

2. On July 21, 1948, pursuant to 18 U. S. C. [1946 ed.] 717 and 723c (Appendix, *infra*, pp. 95–97, 98–99), Board member Rogers issued warrants for the arrest of petitioners as parole violators (R. 41 [Compagna]; Gioe's omitted, see R. 37), each warrant reciting that "reliable information" had been presented to the signer of the warrant that the parolee had "violated the conditions of his parole."[8] The specific respects in which each petitioner had allegedly violated the terms of his parole were set forth in a document entitled "Referral for Consideration of Alleged Violation," bearing the same date as the warrant and ad-

---

them; we have the Chicago police that have watched them; and not one report [of parole violation] has been received by the Board of Parole."

Board member Boleslau J. Monkiewicz, testifying on March 9, 1948, gave like testimony (*id.*, p. 713).

[8] A like warrant had previously been issued, on June 15, 1948, for the arrest of Paul De Lucia as a parole violator, and De Lucia was taken into custody on the following day, June 16, 1948 (see pp. 8–9 of our petition for certiorari in No. 163, this Term). The *Seventeenth Intermediate Report of the Committee on Expenditures in the Executive Departments* (see fn. 2, *supra*, p. 4), dated June 19, 1948, contains the following statement (p. 2; see R. 3):

"The hearings do indicate that the granting of the paroles was improvident, in part due to negligence, and should long ago have been revoked. At the last hearing held in Washington on June 7, 1948, the members of the United States Parole Board, one recently appointed [Chairman George G. Killinger], assured the committee that definite action on the committee's request that the paroles be revoked would be taken, not later than the 19th day of June, 1948."

dressed to the Board of Parole (R. 38, 42).[4] Petitioners were taken into custody pursuant to the warrants and were committed to Atlanta Penitentiary on July 24, 1948 (R. 23, 36, 37).

On July 26, 1948, counsel for petitioners addressed identical letters to the Board of Parole, one on behalf of Compagna and the other on behalf of Gioe (see R. 215, 222), requesting that petitioners be accorded formal hearings on the charges of parole violation (R. 214–215, 220–221). It was requested that each petitioner be given the "benefit of counsel at all stages of the proceeding, including those preliminary to the hearing"; a "specification of the charges or outline of the evidence upon which the warrant was issued * * *. This to be furnished in advance of the hearing in order to give the parolee an

[4] Compagna's "referral" listed the following charges against him (R. 42):

"1. Failure to reveal source of monies used in Settlement of Internal Revenue tax, when questioned before a legally constituted body.

"2. Failure to conduct himself honorably.

"3. Failure to truthfully disclose associates on flight from Kansas City to Chicago following release from Leavenworth."

Gioe's "referral" charged him with (R. 38):

"1. Change of employment without permission.

"2. Failure to truthfully disclose associates on flight from Kansas City to Chicago following release from Leavenworth.

"3. Association with persons of bad reputation.

"4. Failure to conduct himself honorably.

"5. Failure to give a proper accounting of income and expenditures."

opportunity to prepare"; advance notice "of the time and place of the intended hearing in order that [each petitioner] may have present his witnesses"; the "privilege of confronting any witnesses who claim to know of any violation and to hear their testimony and to cross examine"; the "opportunity and permission to produce witnesses"; [p]ermission to have counsel present at all stages of the hearing and to have the benefit of representation by counsel"; "[p]ermission to have present at all stages of the hearing a court reporter to be selected and paid by [each petitioner], or that the Board require the presence of a court reporter and furnish [each petitioner], at his expense, with a transcript"; and "[n]otification of the action of the Board together with a copy of any findings made or orders entered." (R. 214–215, 220–221.) In addition, it was requested on behalf of each petitioner that he be notified whether there was "to be any attempt to revoke the parole on the ground that same was improperly granted or upon facts and circumstances existing at the time of the granting of parole" (R. 214, 220).

On August 6, 1948, the Chairman of the Board of Parole, George G. Killinger, replied to the above letters as follows (R. 216, 222–223):

* * * * *

> We shall be glad to confer with you as counsel for these prisoners at our office in Washington or consider any pertinent in-

formation you may wish to submit in their behalf. It has never been the policy, however, to admit counsel to the deliberations of the Board either at the time it interviews the prisoner in connection with his application for parole or at the time he appears before the Board to make his statement in connection with its revocation or modification. See Rule 4 (d), page 3, of our Rules and Regulations promulgated in 1936. Federal Boards of Parole have uniformly assumed, in the absence of any statutory provision to the contrary, that representation by counsel, taking of formal testimony, confrontation of witnesses, and other proceedings usually associated with criminal trials were not necessary to the determination by the Board as to whether the welfare of society would be promoted by the granting, revocation or modification of parole.

Parole is not a legal right vested in a prisoner. It is merely the granting of permission, as an administrative act by an executive agency, to a prisoner to serve a portion of his sentence outside the prison walls. The parolee continues, both actually and legally, to be in custody. He is, however, allowed to remain in the community within limits fixed by the Board but under conditions that permit of reincarceration in the event of misbehavior, or in the event the Board believes continuance of the prisoner on parole is no longer compatible with the welfare of society.

> To sum up, it is our position that a formal hearing of the kind you seek is not provided for by the statute. We shall, however, be glad to have you submit in writing, or in person at our headquarters, any material or information bearing on these cases.

With respect to the request that petitioners be advised whether the Board was contemplating revocation of the paroles on the ground that they had been "improperly granted or upon facts and circumstances existing at the time of the granting of parole" (*supra*, p. 7), Mr. Killinger replied (R. 216, 222):

> * * * Upon that point you have our assurance that any action we may take looking to revocation of parole, will be based upon events occurring subsequent to release on parole.

3. On September 2, 1948, the present proceedings were instituted by the filing of petitions for writs of habeas corpus on petitioners' behalf in the District Court for the Northern District of Georgia (R. 1–21, 23–27).[1] The legality of petitioners' detention was challenged on the ground that the warrants for their arrest as parole violators had been issued, it was alleged, without "reliable information" of violation (see

[1] Gioe's petition (R. 23–27) was less detailed than Compagna's lengthier petition (R. 1–21), but it in effect incorporated the latter by reference insofar as it was "applicable to [his] case" (R. 27).

18 U. S. C. [1946 ed.] 717, Appendix, *infra*, pp. 95–97), "arbitrarily and capriciously, without any justification in law or fact" (R. 5), and solely in consequence of political pressure brought to bear on the Board to revoke the paroles (see, generally, R. 1–9, 23–27).* Attached to the petitions (see R. 2) were copies of the Report of the Committee on Expenditures in Executive Departments (see fn. 2, *supra*, p. 4) and the transcript of the hearings before the subcommittee of this Committee which investigated the operations of the Board

* A second and independent basis for the petitions was the charge that the original convictions in the Southern District of New York were void because the Government, allegedly, knowingly used perjured testimony against petitioners at their trial, and because the trial court was without jurisdiction of the criminal proceedings for the alleged reason that the conspiracy charged was not formed in New York (see R. 9–15, 27). As pointed out by the Government, however, in its amended response to the District Court's order to show cause why writs of habeas corpus should not issue (R. 46; see also R. 160), and by the Court of Appeals in its opinion (R. 272), any question as to the validity of the original judgments of conviction is required, under 28 U. S. C. 2255, to be raised in the court of conviction by a motion to vacate, and may no longer be collaterally litigated in a habeas corpus proceeding, unless it "appears that the remedy by motion is inadequate or ineffective to test the legality of [the prisoner's] detention." Petitioners have made no showing and do not claim that the remedy provided by 28 U. S. C. 2255, which took effect on September 1, 1948, prior to the commencement of these habeas corpus proceedings, is inadequate or ineffective as a vehicle for challenging the validity of their convictions. Consequently, the decision of the courts below not to inquire into the validity of the convictions in the habeas corpus proceedings is clearly correct, and we shall make no further reference to this issue herein.

of Parole (see pp. 3–4, *supra*), both of which, it was stated, tended to substantiate the charges of the petitions (see R. 2–8, 25–26).

Each petition further stated (R. 20, 26) that—

> The Parole Board has set September 8, 1948, as a tentative date for a hearing in prison and on this September 2, 1948, for the first time has notified your petitioner of the nature of the charges to be made as a basis for revocation [of parole] as follows:

This was followed by a list of the specific charges of parole violation, as contained in the "referral" applicable to each (see fn. 6, *supra*, p. 6), and by general denials of the truth of such charges (R. 20–21, 26–27).

Among the prayers for relief made by each petitioner was the request (R. 18–19; see also R. 27) that "the Parole Board be ordered to grant your petitioner a hearing in accordance with the requirements of the Administrative Procedure Act [of June 11, 1946 (5 U. S. C. 1001–1011); see Appendix, *infra*, pp. 99–107, for pertinent provisions of this Act]." Specifically, it was requested that the court direct the Board of Parole to accord each petitioner a formal hearing, with all the incidents of such a hearing—representation by counsel, the right to produce witnesses on his own behalf, the right to cross-examine opposing witnesses, etc.—as had previously been requested of the Board in peti-

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tioners' counsel's letter of July 26, 1948, *supra*, pp. 6–7.

On September 20, 1948, pursuant to orders to show cause why the prayed-for writs should not issue (R. 28; see R. 37), respondent filed responses (R. 28–36; see R. 37) justifying his detention of petitioners on the basis of the original conviction and sentence of each (R. 28–29), and the issuance of the parole-violation warrants and the "referrals" listing the specifications of such violations (R. 28–29).[9] The responses further stated that on September 8, 1948, petitioners had been given hearings in the penitentiary before two of the three members of the Board of Parole; that the Board then had under consideration the question of whether or not petitioners had violated the conditions of their paroles; that in due course the Board would, on the basis of their findings, issue orders either revoking or reinstating the paroles; but that no such decisions had as yet been made (R. 31; see R. 37). Accordingly, each response averred (R. 31; see also R. 35)—

> Petitioner has not even exhausted his administrative remedy, and this habeas corpus proceeding is premature by reason of the fact that the United States Board

[9] Copies of the original conviction, sentence, commitment, etc., of each petitioner (R. 36–37, 39–40, 42–46), and the parole-violation warrant (R. 41 [Compagna]; Gioe's omitted, see R. 37) and "referral" applicable to each (R. 38, 42) were attached to the respective responses as exhibits.

> of Parole has not taken final administrative action in its discretionary power as provided by the Acts of Congress to actually render final decision as to whether the parole should be revoked or modified * * * [citing 18 U. S. C. [1946 ed.] 719, Appendix, *infra,* pp. 97–98].

The responses, in addition, denied the applicability of the Administrative Procedure Act to any phase of the activities of the Board of Parole (R. 31–36, 47; see R. 37).

On September 27, 1948, each petitioner (see R. 23) filed an amendment of his petition (R. 22–23) alleging that the hearing accorded him on September 8th by two members (Killinger and Monkiewicz) of the Board of Parole was not such a hearing as is contemplated by the Administrative Procedure Act. Specifically, the amendment alleged (R. 22)—

> * * * Your petitioner was cross-examined concerning the charges herein referred to [*i. e.,* in the original petition, in which the charges of parole violation, as contained in each petitioner's "referral," were quoted and denied; see p. 11, *supra,* and fn. 6, *supra,* p. 6] and your petitioner repeated denial to said charges. A court reporter took notes. Your petitioner maintained and stated to the members of the Board that no violation of parole had occurred. The matter was continued generally and referred to Washington. No evidence other than that of your

> petitioner was introduced. Although specifically requested of the members of the Board on September 8, 1948, your petitioner was denied the right of counsel and all other necessary incidents of a proper hearing.[10]

In a traverse to the response to the show-cause order (R. 47–49), filed at about the same time as the above-described amendment of his petition, each petitioner alleged (R. 48):

> 79. * * * Respondent has failed to meet the real issue and appears to take the position that * * * the [parole-violation] warrant [is] good, regardless of the facts. We find no denial * * * in the Response that the warrant was arbitrarily issued in the absence of evidence.
>
> * * * * *
>
> 82. The Response alleges that final Administrative action has not been taken. Petitioner states the fact to be that the so-called warrant is a commitment and as such is final.

4. On September 27, 1948, following a hearing on the foregoing pleadings (R. 50–87), writs of habeas corpus were granted, returnable on October 25, 1948 (R. 49). On the latter date, a hearing

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[10] When petitioners appeared before members Killinger and Monkiewicz of the Board of Parole in the penitentiary on September 8, 1948, each petitioner read to the Board members a copy of the letter of July 26, 1948, *supra*, pp. 6–7, written by their counsel to the Board, in which formal hearings for petitioners were requested (R. 217, 223).

on the writs was held (R. 93–207) at which both petitioners testified (R. 94–117, 117–136).

At the commencement of the October 25th hearing (see R. 93–94), respondent filed an amendment of each of his responses to the show-cause orders (R. 46–47), stating that he was (R. 46)—

> * * * without personal knowledge whether the warrant issued by the United States Board of Parole * * * was issued capriciously and without reliable information, as alleged by the petitioner, but that the recitation in the warrant that it was issued upon reliable information creates a presumption of regularity and legality.

The October 25th hearing then proceeded with the giving of testimony by petitioners (R. 94–117, 117–136). Each petitioner was permitted to testify, over the repeated objections of the Government (R. 98, 102, 105, 115–116, 121, 130) that the charges of parole violation, as contained in the referrals (see fn. 6, *supra*, p. 6), were not true (Gioe: R. 98–106; Compagna: R. 120–129).[11] Pe-

[11] One of the charges of parole violation made against petitioner Compagna was "Failure to reveal source of monies used in Settlement of Internal Revenue tax, when questioned before a legally constituted body" (see fn. 6, *supra*, p. 6). On February 17, 1948, Compagna testified before the subcommittee of the House Committee on Expenditures in the Executive Departments that was investigating the operations of the Board of Parole (see pp. 3–4, *supra*) that while he was in prison his then attorney, Eugene Bernstein, on his behalf, paid the United States Government some $89,000 in settlement of certain income tax claims against him; that various "friends" of his (Compagna's) furnished the money; but that he did not know who these "friends" were (Hearings [see p. 4,

titioners also testified over objection that the hearings accorded them by the Board of Parole in the penitentiary consisted merely of their being questioned by the two Board members present relative to the charges contained in the referrals, and that they (petitioners) asked for and were refused permission to be represented by counsel at the hearings, to produce witnesses in their behalf, and to be accorded the other benefits of a formal hearing enumerated in their counsel's letter to the Board of Parole of July 26, 1948, *supra*, pp. 6–7 (R. 100–101, 107, 119–120). The Government moved to strike all such testimony (R. 115), and the motion was denied (R. 115–117). The objections to both these lines of testimony were based on the asserted ground that it was the exclusive function of the Board of Parole to determine whether violations of parole had occurred, and that, pending decision by the Board

supra], pp. 279–282). Bernstein had previously testified before the subcommittee that he himself never knew the identities of these persons who had furnished the tax-settlement money; he explained that the money was supplied by "[e]ight or nine different persons," who either mailed him the money or brought it to him in person, saying "Pay this for Louis [Compagna]" (Hearings, pp. 72–73). At the habeas corpus hearing, Compagna insisted, both on direct (R. 125) and on cross-examination (R. 130–135), that he had testified truthfully before the subcommittee; that he still did not know the identities of his benefactors (R. 127, 133–134); and that he had made no efforts to determine who they were (R. 127, 132).

See also Gioe's testimony as to his connection with one Phil Macy (R. 104–108) and compare charge 3 in the referral, quoted *supra*, fn. 6, p. 6.

as to whether there had been violations and whether the paroles should be revoked, petitioners' assertions in habeas corpus proceedings that they had not violated their paroles and had not received fair hearings by the Board were irrelevant because premature (see, especially, R. 115–116).

Also received in evidence on petitioners' behalf at the October 25th hearing (R. 152, 211) was a deposition by Board member Monkiewicz in the form of answers (R. 218–225) to certain written interrogatories (R. 231–233).[12] The more relevant of the interrogatories, and the corresponding answers, were as follows:

> 52. Is the testimony given by you correctly reported in the printed copy of the volume entitled, "Hearings Before a Subcommittee of the Committee on Expenditures in the Executive Departments House of Representatives Eightieth Congress Second Session"? Would you make the same answers here if the same questions were here put to you? [R. 231.]
>
> [A.] The answer to the first part of the question is "Yes."[13]

[12] The same interrogatories were propounded to Board Chairman Killinger (R. 229–231), and identical answers were made (R. 212–218). Interrogatories identical with those propounded to Messrs. Monkiewicz and Killinger were proposed to be put to the third member of the Board, Mr. Rogers (see R. 227–229), but, owing to the latter's absence from Washington at the time the other members of the Board made their answers, they were not answered (R. 211–212).

[13] For the asserted relevance of this reply, see p. 4, *supra*, and fn. 4.

I decline to answer the second part of the question since it involves a matter now pending before the Board of Parole. [R. 219.]

53. In the warrant signed by Judge Rogers, Judge Rogers recites that reliable information has been presented to him of a violation. Will you please state what the information was as to each case? When it reached you? Its source, and your reasons, if any, for believing it to be reliable? [R. 231.]

[A.] Answers to the three questions here involved is [*sic*] declined because they relate to a matter now pending before the Board of Parole. [R. 219.]

* * * * *

55. Has the Parole Board caused the publication of information, rules, opinions, orders and public records as required by sec. 1002, Title 5, United States Code? [R. 231.]

[A.] I have been advised that Section 1002, Title 5, United States Code, which is part of what is commonly referred to as the "Administrative Procedure Act," is inapplicable to the U. S. Board of Parole. [R. 219.]

* * * * *

57. In these cases, has the Parole Board made any effort to comply with sec. 1004, Title 5, United States Code [§ 5 of the Administrative Procedure Act, Appendix, *infra*, p. 101]? [R. 231.]

[A.] The answer is the same as that in question No. 55. [R. 219.]

* * * * *

60. Is it a fact that these parolees have requested, and the Parole Board has denied, the right to be accompanied, represented and advised by counsel in the matter of hearings before the Parole Board on the question as to whether or not there has been a violation of parole? [R. 232.]

[A.] By letter of July 26, 1948, counsel for the parolees requested "the benefit of counsel at all stages of the proceedings including these [*sic*] preliminary to the hearing." The attitude of the Board of Parole upon that request is reflected in a letter sent by the Board to William Scott Stewart, dated August 6, 1948. Copies of this correspondence are incorporated herein and made part of this reply. [R. 220.] (N. B. The letters referred to were then set forth *verbatim* (R. 220–223). See pp. 6–9, *supra,* where the substance of these letters is set forth.)

61. Has the Parole Board made any effort to comply with sec. 1006, Chapter [*sic*] 5, United States Code as to Hearings [§ 7 of the Administrative Procedure Act, Appendix, *infra,* pp. 102–104]? [R. 232.]

[A.] The answer is the same as in question No. 55 [R. 223].

62. Is it not true that a so-called hearing, as to the cases of Compagna and Gioe, was held in the Penitentiary at Atlanta by two members of the Parole Board, George Kil-

linger and B. J. Monkeiwicz [*sic*], in which hearing the parolees were denied the right of counsel, and the usual requirements as to due process, and that no effort was made to comply with the Administrative Procedure Act? [R. 232.]

[A.] Compagna and Gioe were given an opportunity to appear before Board members Killinger and Monkiewicz at Atlanta Penitentiary on September 8, 1948. At such appearance both Compagna and Gioe read to the Board members a copy of the letter written by Mr. Stewart to the Board of Parole on July 26, 1948 [see pp. 6–7, *supra*], copy of which is made part of my reply to Question No. 60. Gioe read the said letter at the start of his appearance and thereafter answered all questions without objection. Compagna answered all questions without objection and at the conclusion of his appearance read the said letter of July 26, 1948. Section 719, Title 18, United States Code [see Appendix, *infra*, pp. 97–98], now Section 4207, same Title, which is the authority under which the Board acts in such matters, contains no provision for representation by counsel. I am unable to state, therefore, that these parolees were denied the usual requirements as to due process. As stated in the answer to question No. 55, the Administrative Procedure Act is believed to be inapplicable to the Board of Parole. [R. 223–224.]

* * * * *

64. Have the members of the Parole Board who conducted the hearing of September 8, 1948, in Atlanta, made a decision and if so what is that decision? [R. 232.]

[A.] No decision has been reached [R. 224].

65. * * * If no finding has been made please state when we may expect a finding and reasons for delay [R. 232].

[A.] * * * No definite date can be stated at this time when a finding will be made. However, there has been and will be no unnecessary delay in making a finding in these cases. All appearances of prisoners before the Board of Parole are stenographically reported and such appearance[s] run well into the hundreds at every meeting held by the Board. The stenographic notes are returned to the Board's offices in Washington and transcribed by the reporter upon his return to Washington following successive meetings at three or four different penal institutions. Thereafter each case receives separate consideration by the Board members, one-third of whose time is consumed in holding parole meetings in the field and travel incidental thereto. This information is given in order that the court may appreciate that an elapsed period of even several months between appearance and decision in such matters cannot be considered either unusual or unreasonable. [R. 224.]

66. Is it not true that these parolees have requested a transcript of the hearing of

September 8, 1948, and have offered to pay for the same, and that the Parole Board has refused to furnish same? [R. 232.]

[A.] Yes. In explanation I will add that there is neither a statutory nor customary provision for furnishing such transcripts to parolees [R. 224.]

67. Give a summary of the evidence upon which it is claimed that there has been a violation of parole? [R. 232.]

[A.] I decline to answer because it involves a matter now pending before the Board of Parole. [R. 224.]

* * * * *

Following the presentation of the above-summarized evidence on petitioners' behalf, and the election of the Government to present no rebuttal evidence, argument of counsel was heard on the question of whether, under the pleadings and proof thus far adduced, petitioners were entitled to be discharged (R. 161–207). Counsel for petitioners contended that it had been established by the pleadings and evidence that the Board of Parole had arbitrarily issued the warrants of parole violation without evidence or information of violation, and that consequently the warrants were void and petitioners' detention illegal (R. 163, 167, 170–171, 174, 176, 177, 179, 205). Government counsel renewed and amplified the Government's argument, previously made in its responses to the show-cause orders (*supra*, pp. 12–13), that the habeas corpus proceedings were pre-

mature (and the court, accordingly, without jurisdiction) because the orderly administrative process for the revocation of parole, provided for by statute, had not yet been completed, and would not be completed until the Board, having issued warrants and granted petitioners the appearances required by statute, took final action by revoking the paroles (if and when it determined that the charges of violation had been substantiated) (R. 187–194, 199–201). (See *United States ex rel. Jacobs* v. *Barc,* 141 F. 2d 480, 483 (C. A. 6).) In reply to the court's query as to what evidence or information, if any, the Board had to support the charges of parole violation contained in the warrants and accompanying referrals (R. 200, 201), counsel for the Government insisted that inquiry into this matter was premature for the above-stated reasons and announced their intention of "stand[ing] on the proposition of law" (R. 201).

5. On December 4, 1948, the District Court (Underwood, D. J.) made "findings of fact and conclusions of law" (R. 242–250) and entered orders (R. 250–251) sustaining the writs and directing petitioners' discharge from custody. The court held that under 18 U. S. C. [1946 ed.] 717 (Appendix, *infra,* pp. 95–97), an "express condition precedent to the issuance of a Parole Violator Warrant is that the issuing authority 'have reliable information that the prisoner has violated his parole.' This is in the nature of a jurisdictional requirement and may be inquired into by compe-

tent authority" (R. 244); and that, while "[t]here is a presumption of the legality of the warrant, * * * it is not a conclusive presumption and it has been overcome by the evidence in the case" (R. 245). Judge Underwood made it clear that he did not conceive it his function to inquire into the reliability of any information on which the Board of Parole may have acted in issuing the warrants, but merely to determine whether the Board acted on any "substantial information," reliable or otherwise (R. 244; see also R. 203, 206).[14]

The orders directing petitioners' discharge specified that they should not take effect until 15 days from the date of entry, the purpose of the delay being "to afford opportunity for appeal if desired, or in order to enable the United States Board of Parole to issue * * * new parole Violator Warrant[s], provided said Board, or a member thereof, has, or shall become possessed of, reliable information of parole violation during such period of delay" (R. 250–251).

6. On December 17, 1948, within this 15-day

[14] Judge Underwood held that petitioner's contentions that their original convictions were void were "without merit" (R. 243), and found it "not necessary to consider the other grounds of the petitions for writ[s] of habeas corpus" (R. 250). See, however, his subsequent opinion and order denying respondent's motions to reconsider, wherein he held, as a partial basis for denying the motions, that the hearings accorded petitioners by the Board of Parole had not been fair (*infra*, pp. 25–27).

period, respondent filed in the District Court "motion[s] to reconsider" its judgments (R. 251–252) on the ground that on the preceding day, December 16th, the Board of Parole had "taken action by revoking the parole[s]" of petitioners, with the consequence that he, respondent, "now holds the said [petitioners] in custody upon the basis of the official revocation of parole[s], * * * to complete service of the sentence[s] originally imposed as required by law" (R. 251). Copies of the "certificate[s] of revocation" were attached to the motions as exhibits (R. 252 [Compagna]; Gioe's omitted).

Pursuant to an order to show cause why the motions to reconsider should not be granted (R. 253), a hearing was set for December 20, 1948. On the latter date, "[c]ounsel advised the Court that they did not desire to present further evidence or argument" (R. 253), and the motions were denied (R. 254). In a short opinion accompanying the order of denial, Judge Underwood said (R. 253–254):

> On December 4, 1948, judgments in the habeas corpus proceedings were entered discharging petitioners from custody. The judgments were final, but execution of them was stayed for fifteen (15) days for two purposes only—to allow time for appeal or for issuance by the Parole Board of valid Parole Violator Warrants. Neither action was taken.

These motions request reconsideration of the judgments for the sole reason that the Parole Board has now revoked the paroles, such action having been taken on December 16, 1948.

On what grounds or on what evidence, if any, other than the mere revocations, is not shown, but the Court and petitioners are still left in the darkness which shrouded the habeas corpus trials in which the members of the Board declined to even state what violations of the parole were charged [15] and indicated that no hearings would be granted petitioner[s] other than the "appearances" they had had before the Board. These "appearances" fall far short of the fair hearing which the law contemplates.

If the motions were granted, there is no reason to suppose that upon reconsideration the Court would be met with anything but silence similar to that encountered at

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[15] Judge Uunderwood's statement that "the members of the Board declined to even state what violations of the parole were charged" is inaccurate and misleading, as pointed out by the Court of Appeals (R. 274). The "referrals," issued simultaneously with the warrants, listed the specific respects in which petitioners were charged with having violated their paroles (see pp. 5–6, *supra*, and fn. 6), and petitioners were well aware of the nature of the alleged violations at least as early as September 2, 1948, when they filed their petitions for habeas corpus (see p. 11, *supra;* R. 281, 285). It seems evident that what Judge Underwood meant was that the members of the Board declined to state on what information the charges were based (see R. 201, 206).

the hearings already had and nothing would be gained.

The revocations of parole were based on illegal Parole Violator Warrants and were issued without fair hearings and in my opinion are invalid.

7. On appeal by respondent to the Court of Appeals for the Fifth Circuit, the orders sustaining the writs and directing petitioners' discharge were reversed (R. 269–277, 279), one judge dissenting (R. 277–278). The majority found it unnecessary to determine whether the District Court was right when, on December 4, 1948, prior to the taking of final action by the Board of Parole on December 16th revoking the paroles, it ordered petitioners' discharge pursuant to its holding that parolees in custody under violation warrants can successfully challenge on habeas corpus the validity of their detention on showings that the warrants were issued without information of violations. For the majority, the decisive feature of the case was the Board's taking of that final action of parole-revocation prior to the effective date of the District Court's orders of discharge. Upon revocation of the paroles, the parolees were no longer held merely under the warrants alleging parole-violation, but, by virtue of the certificates of revocation, under the original commitments themselves (see R. 251, 252). Consequently, the majority thought, after the paroles were revoked, the question of the legality

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of the parolees' prior detention under the warrants became, in effect, moot. Upon revocation of parole, as the majority put it, "[t]he warrant has become unimportant" (R. 275).

Accordingly, in the opinion of the majority, upon the revocation by the Board of Parole of petitioners' paroles prior to the effective date of the orders of discharge, and the filing by respondent of motions, based on the intervening revocations, to reconsider the orders of discharge, the District Court erred in summarily denying the motions to reconsider. "If a revocation of a parole can ever be attacked collaterally by habeas corpus against the Warden," the majority said (R. 276), "it ought to be nullified only on plain evidence and a full hearing." The order of reversal and remand, therefore, directed that petitioners be remanded to respondent's custody "with leave to [petitioners], if so advised, to enlarge their pleadings so as to present, if they can, a case of total nullity of the orders revoking their paroles under which they are now held" (R. 276–277, 279).

The majority also held that the "appearances" accorded petitioners in the penitentiary by the Board of Parole, pursuant to 18 U. S. C. [1946 ed.] 719 (Appendix, *infra*, pp. 97–98), had not been unfair (as the District Court had thought, see pp. 26–27, *supra*), but, on the contrary, had been in

accordance with law."[16] "The requirements as to procedure in the Administrative Procedure Act," the majority decided, "have no application to the Parole Board" (R. 275; see also R. 272–273).[17] And, with particular respect to petitioners' contention that they had been unlawfully deprived of the assistance of counsel at their appearances

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[16] The dissenting judge expressed no views on this aspect of the case (see R. 277–278).

[17] In reaching the conclusion that the Administrative Procedure Act does not apply to the Board of Parole, the majority said (R. 272–273):

"* * * It [the Administrative Procedure Act] has never been thought applicable by the Board or the Attorney General who appoints its members and approves its rules. The full dress procedure it requires would render it practically impossible for the Board to handle its business. * * * [Parole] is a legislative grace and not a thing of right. The legislature may affix such conditions and provide such administration as it will. Courts have no function, except as the statutes give them power. As respects parole, the original statutes [18 U. S. C. (1946 ed.) 714 *et seq.*, Appendix, *infra*, pp. 93–99], as well as the revision now of force [18 U. S. C. (1948 rev.) 4201–4207], bristle with discretion given the Board, and are silent about court interference. * * * It is very evident that the whole matter of paroles is left to the informed discretion of the Board. Court action is not made a part of it. The Administrative Procedure Act, in authorizing court review of the acts of the agencies which it governs, as to them excludes such action when '(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.' 5 U. S. C. A. Sec. 1009 [§ 10 of Act, Appendix, *infra*, pp. 105–107]. Certainly no review of what the Board is doing or has done can be undertaken by habeas corpus where the Board is not a party * * *." (But see § 10 (b), 5 U. S. C. 1009 (b), Appendix, *infra*, pp. 105–107, which mentions habeas corpus as one of the forms of judicial review of agency action.)

before the Board, the majority said (R. 275–276)—

> * * * The Chairman [of the Board of Parole] by letter offered to let counsel come before the full Board in Washington and present any material or information bearing on the cases, though he declined to have a full scale trial. [See pp. 7–9, *supra*.] This was not unfair. * * * We are aware that in *Fleming* v. *Tate*, 156 F. 2d 848 [(C. A. D. C.)], it was held that the statute, then 18 U. S. C. A. Sec. 719,"

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[18] Actually, the statute construed in *Fleming* v. *Tate* was § 24–206 of the District of Columbia Code (1940 ed.), which provided in pertinent part when *Fleming* v. *Tate* was decided (in 1946): "At the next meeting of the [District of Columbia] Board of Indeterminate Sentence and Parole held after the issuing of a warrant for the retaking of any paroled prisoner, said board shall be notified thereof, and if such prisoner shall have been returned to the institution, he shall be given an opportunity to appear before said Board of Indeterminate Sentence and Parole, and the said board may then, or at any time in its discretion, revoke the order and terminate such parole or modify the terms and conditions thereof * * *." However, a comparison between the quoted language of the District of Columbia statute and 18 U. S. C. [1946 ed.] 719 (see Appendix, *infra*, pp. 97–98)—the corresponding provision of the general federal parole laws—shows that the two statutes were worded in substantially identical phraseology when *Fleming* v. *Tate* was decided. The only difference was that, whereas under § 24–206 of the District of Columbia Code the appearance was required to be before the "Board" itself, the appearance provided for by 18 U. S. C. [1946 ed.] 719 could be before the "Board of Parole, a member thereof, or an examiner designated by the Board." (N. B. In 1947, § 24–206 of the District of Columbia Code was amended so as to permit the parolee's appearance to be, as in the case of appearances

in stating that a paroled prisoner returned to custody "shall be given an opportunity to appear before said board of parole," meant he should have an effective hearing, including assistance of counsel, and the long practice otherwise was unlawful. The decision would seem to invalidate on habeas corpus a vast number of parole revocations. Congress, in revising the parole law, Revised Title 18, Sec. 4207, changed the wording to read: "A prisoner retaken upon a warrant issued by the Board of Parole, shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board."[19] This change cuts deeply into the idea that the appearance is to be a trial. An examiner may conduct it now, and it would seem that the taking of the testimony of the prisoner, and perhaps his witnesses, is

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under 18 U. S. C. [1946 ed.] 719, before "the Board, a member thereof, or an examiner designated by the Board." Act of July 17, 1947, c. 263, § 5, 61 Stat. 378, 379. In addition to thus making the phraseology of § 24–206 of the District of Columbia Code conform to that of 18 U. S. C. [1946 ed.] 719, the 1947 amendatory Act (same section) added the following new provision to § 24–206, not contained in 18 U. S. C. [1946 ed.] 719: "At such hearing he may be represented by counsel." See note 34, pp. 76–77, *infra*.)

[19] The majority were mistaken in thinking that the clause "a member thereof, or an examiner designated by the Board" was introduced into the parole laws for the first time in the 1948 revision of Title 18 of the United States Code. See 18 U. S. C. [1946 ed.] 719 (Appendix, *infra*, pp. 97–98); *id.* [1940 ed.]; fn. 18, *supra*, pp. 30–31. The clause was added to the parole laws by the Act of June 29, 1940, c. 449, § 3, 54 Stat. 692.

alone contemplated. The Chairman's formal offer to counsel that he appear before the Board in person or in writing and present what he desired, following the appearance in person of the prisoners before two members of the Board who heard and preserved the record of what they had to say, we think is a sufficient opportunity to appear. * * *"[20]

SUMMARY OF ARGUMENT

I

When, before the effective date of the district court judgment releasing petitioners on habeas corpus, the Parole Board acted to revoke petitioners' paroles, the alleged defect in the parole-violation warrants became unimportant, since they were merely preliminary processes for the retaking of the parolees, and the proper question for judicial consideration was whether the revocations of parole were void and the custody of peti-

[20] In view of the majority's decision that petitioners had not been deprived of any right to which they were entitled under the law in the conduct of the appearances granted them by the Board of Parole in the penitentiary, it would seem to follow that the order of reversal and remand—directing petitioners' restoration to respondent's custody "with leave to [petitioners], if so advised, to enlarge their pleadings so as to present, if they can, a case of total nullity of the orders revoking their paroles under which they are now held" (*supra*, p. 28)—limits the scope of the permitted challenge of the revocation orders in the new proceedings in the District Court to an attack upon the revocations as being unsupported by any evidence or information of parole violation, and hence arbitrary.

tioners unlawful. See, e. g., *Stallings* v. *Splain*, 253 U. S. 339, 342–343; *Kelly* v. *Griffin*, 241 U. S. 6, 12–13; *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 662. The district court's order granting habeas corpus cannot be deemed to have had the effect of precluding Parole Board consideration of parole revocation or judicial review of the final revocations. *Securities & Exchange Commission* v. *Otis & Co.*, 338 U. S. 843; *Morse* v. *United States*, 267 U. S. 80, 85; *Messenger* v. *Anderson*, 225 U. S. 436, 444. Consequently, as the court below stated, the district court erred when it "did not try at all the Warden's pleading presenting the orders of revocation, but hastily condemned them."

The remand order of the court below, granting leave to petitioners "to enlarge their pleadings so as to present, if they can, a case of total nullity" of the revocations, accords them every right that they can legitimately demand.

II

In allowing petitioners to appear before it and expressing its willingness separately to hear counsel orally or in writing and to receive relevant material or information, the Board of Parole accorded petitioners all the procedural rights to which they were entitled.

A. The "opportunity to appear" before the Board of Parole considering parole violations, granted in the Federal Parole Act, is not a right

to a full-dress formal hearing or trial. The word "hearing" is not even used in the statute; a parolee is, in contemplation of law, still a prisoner (*Anderson* v. *Corall*, 263 U. S. 193, 196); the Board's role is that of "guardian" of the parolee "ward"; and the practice in the States is to accord parolees either no hearing or a summary, informal one. In the light of these circumstances, there is no warrant for inferring that Congress made mandatory a formal hearing before parole could be validly revoked.

The contrary inference is, indeed, the more reasonable. From 1910 to the present, the parole boards have uniformly construed the statute as not requiring a formal hearing of the type petitioners demand, and implicit congressional sanction and approval appears to have been accorded this construction. During the legislative consideration of the Parole Act, moreover, a section of a bill containing the phrase "opportunity to appear" was described by the Senate and House conferees as containing provisions "substantially common" to another bill omitting the appearance requirement. Such a descriptive summary would hardly have been used if the phrase "opportunity to appear" connoted a formal hearing with all the accoutrements of a trial. Indeed, the statute could not, as a practical matter, be read to require a full trial, since Congress has not granted the Board the oath-administering, subpoena, and related powers which would be indispensable attri-

butes of a formal adjudicatory tribunal in this field.

In the closely related field of probation, this Court has held that one charged with violations of the terms of probation is not entitled to "a hearing upon such charges according to the established rules of judicial procedure." *Burns* v. *United States*, 287 U. S. 216, 219. The "end and aim" of the appearance required by the probation statute is "to enable an accused probationer to explain away the accusation * * *. This does not mean that he may insist upon a trial in any strict or formal sense." *Escoe* v. *Zerbst*, 295 U. S. 490, 493.

The Federal Parole Act does not impose a broad, inflexible requirement that a parolee is always entitled to produce witnesses and to have counsel representing him when he appears before the Board considering revocation. The Act requires only that an "opportunity to appear" be accorded, and there is no showing in this case that petitioners were denied that opportunity, particularly in view of the Board's willingness to hear counsel and receive relevant material and information, though not at the same time that it heard the parolees themselves. *Fleming* v. *Tate*, 156 F. 2d 848 (C. A. D. C.), construing provisions of the District of Columbia Code similar to those in the Federal Parole Act, does not require more. But if it be read as always requiring the hearing of counsel and witnesses at

the same time as the parolee makes his appearance, it is wrong. The mere absence of counsel does not, in all circumstances, constitute the denial of an "opportunity to appear". Compare, *e. g.*, *Quicksall* v. *Michigan*, 339 U. S. 660; *Betts* v. *Brady*, 316 U. S. 455, with *Gibbs* v. *Burke*, 337 U. S. 773, 780.

B. From what has already been said, it is apparent that Congress, in the Federal Parole Act, did not contemplate that parole revocation would constitute a "case of adjudication required by statute to be determined on the record after opportunity for an agency hearing" Section 5 of the Administrative Procedure Act. Consequently, the parole revocation proceeding is not subject to Sections 5, 7, or 8 of the Administrative Procedure Act since those sections apply only in such cases.

Similarly, Section 6 (a) of the Administrative Procedure Act, properly read, does not add to the "opportunity to appear" required by the Parole Act. The first two sentences of the section imposing more stringent requirements, are less aptly descriptive of the parole revocation proceeding than is the third, referring to the right of an "interested person" to "appear" before "any agency" concerned with the "adjustment, or determination of any issue" in a "summary" "proceeding".

C. This Court has made it clear, in describing the status of a parolee and the rights of proba-

tioners in that analogous field, that the will of Congress is controlling and that the Constitution imposes no additional substantive or procedural requirements applicable to parole revocation. *Anderson* v. *Corall,* 263 U. S. 193, 196; *Burns* v. *United States,* 287 U. S. 216, 220; *Escoe* v. *Zerbst,* 295 U. S. 490, 492–493; cf. *Williams* v. *New York,* 337 U. S. 241, 247–251.

ARGUMENT

I

The District Court erred in releasing petitioners before a full hearing on the validity of the final parole revocations

Pretermitting for the moment questions relating to the fairness and legality of the mode of conduct of petitioners' appearances before the Board of Parole on September 8, 1948 (these questions being reserved for point II, *infra,* pp. 49–92), it is important to emphasize at the outset the extreme narrowness of the issue which this case presents for review, *viz.,* the correctness of the Court of Appeals' qualified judgment of reversal and remand, set forth at p. 28, *supra.*

When these habeas corpus proceedings were instituted, petitioners were being detained under parole-violation warrants charging them with having violated the terms of their paroles. They challenged the legality of these warrants on the ground that, allegedly, they had been arbitrarily issued; *i. e.,* it was claimed that the member of the Board of Parole who issued the warrants had,

contrary to the recitations contained in them, no information to support the charges of parole violation. The Government, as we have pointed out (*supra*, pp. 12–13, 22–23), both in its pleadings and oral argument in the District Court, took the position that habeas corpus to test the legality of petitioners' detention was premature until the administrative process, initiated by the issuance of the warrants, had been concluded by the issuance of orders revoking their paroles. See *United States ex rel. Jacobs* v. *Barc*, 141 F. 2d 480, 483 (C. A. 6). In effect, though not in terms, the Government demurred to the allegations of the petitions and subsequent pleadings, admitting their truth *arguendo* to test the question of law though not as a matter of fact. See *supra*, p. 15.[21]

The Government's contention was based (see R. 189) on the general principle that judicial redress from a supposed injury arising from administrative action may not be sought until prescribed administrative remedies have been exhausted[22]—

[21] Cf. *United States ex rel. De Lucia* v. *O'Donovan*, 178 F. 2d 876 (C. A. 7), pending on petition for a writ of certiorari, No. 163, this Term, a companion case to the instant case, where the Government formally demurred to habeas corpus allegations substantially identical with those made in the case at bar.

[22] *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540, 543–545; *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, 50–52; *United States* v. *Sing Tuck*, 194 U. S. 161, 167–168, 170; *Falbo* v. *United States*, 320 U. S. 549, 553–554; see *Estep* v. *United States*, 327 U. S. 114, 123. Even where the allegations of a habeas corpus petition, if true, show that the administrative

the same principle on which is based the well-settled rule in deportation cases that the adminis-

agency is without jurisdiction, the doctrine of the necessity of exhausting administrative remedies before resorting to the courts still applies. A contention to the contrary was rejected by this Court in *United States* v. *Sing Tuck*, *supra*. That was a habeas corpus proceeding by applicants for admission into the United States who claimed to be citizens but who had failed to invoke their statutory right to appeal to the Secretary of Commerce and Labor from the adverse decision of the immigrant inspector excluding them. Speaking for the Court, Mr. Justice Holmes said (194 U. S. at 167–168):

"* * * [T]he act * * * points out a mode of procedure which must be followed before there can be a resort to the courts. In order to act at all the executive officer must decide upon the question of citizenship. If his jurisdiction is subject to being upset, still it is necessary that he should proceed if he decides that it exists. An appeal is provided by the statute. The first mode of attacking his decision is by taking that appeal. If the appeal fails it then is time enough to consider whether upon a petition showing reasonable cause there ought to be a further trial upon *habeas corpus*.

"We perfectly appreciate, while we neither countenance nor discountenance, the argument drawn from the alleged want of jurisdiction. But while the consequence of that argument if sound is that both executive officers and Secretary of Commerce and Labor are acting without authority, it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way. If the allegations of a petition for *habeas corpus* setting up want of jurisdiction, whether of an executive officer or of an ordinary court, are true, the petitioner theoretically is entitled to his liberty at once. Yet a summary interruption of the regular order of proceedings, by means of the writ, is not always a matter of right. * * *"

Compare *Gates* v. *Woods*, 169 F. 2d 440, 443 (C. A. 4): "* * * The rule as to the exhaustion of administrative remedies applies just as forcibly when, as here, the contention is made that the administrative agency lacked jurisdiction over the subject-matter."

trative process must be completed by the issuance of a deportation order before resort may be had to the courts to challenge the legality of any step in the administrative proceedings leading up to the issuance of the order.[23]

The District Court, in entering its orders of December 4, 1948 (*supra*, p. 23), sustaining the writs and directing petitioners' discharge from custody (the orders not to take effect, however, until 15 days thereafter, see *supra*, p. 24), re-

[23] The deportation process begins with the alien's arrest under a warrant charging him with being in the country in violation of law. This is followed by a hearing on the charges, the submission of proposed findings and a proposed order, and finally the issuance of the order, or warrant, of deportation. Habeas corpus proceedings challenging the legality of the alien's detention during these proceedings are premature until the administrative process has culminated in the final act—the issuance of the warrant of deportation. *United States ex rel. Zdunic* v. *Uhl*, 144 F. 2d 286 (C. A. 2), affirming 56 F. Supp. 403, 410 (S. D. N. Y.); *United States ex rel. Loucas* v. *Commissioner of Immigration*, 49 F. 2d 473 (S. D. N. Y.); *United States ex rel. Eisler* v. *District Director of Immigration*, 76 F. Supp. 737 (S. D. N. Y.), reversed on other grounds *sub nom. United States ex rel. Doyle* v. *District Director of Im. and Nat.*, 169 F. 2d 753 (C. A. 2); *United States ex rel. Petersen* v. *Commissioner of Immigration*, 1 F. Supp. 735, 736 (S. D. N. Y.); cf. *United States ex rel. Potash* v. *District Director of Im. and Nat.*, 169 F. 2d 747, 752 (C. A. 2); *United States ex rel. Trinler* v. *Carusi*, 166 F. 2d 457, 459–460 (C. A. 3), vacated on other grounds, 168 F. 2d 1014; *Impiriale* v. *Perkins*, 66 F. 2d 805, 806 (C. A. D. C.), certiorari denied, 290 U. S. 690; *Scholnick* v. *Clark*, 81 F. Supp. 298 (D. D. C.). There would seem to be little reason for affording readier access to the courts to convicted felons charged with parole violation than is granted resident aliens charged with being unlawfully in the country.

jected this contention of the Government. It held that where a parolee, held under a parole-violation warrant, alleges that the warrant was issued without information of parole violation, and where he adduces evidence which makes out a *prima facie* case in support of his allegation (which evidence the Government, insisting on its contention that the habeas corpus proceedings are premature, does not rebut), he is entitled to be discharged from custody without awaiting final action by the Board of Parole. At this juncture, the legal issue involved was precisely the same as the issue involved in *United States ex rel. De Lucia* v. *O'Donovan,* 178 F. 2d 876 (C. A. 7), pending on petition for a writ of certiorari, No. 163, this Term (see pp. 13–14 of our petition in that case).[24] However, subsequent developments in the case at bar had the effect of mooting this issue, as the court below held, with the result that the actual decision of the Court of Appeals in this case is much narrower than the Seventh Circuit's decision in the *De Lucia* case.

In the present case, during the 15-day interval which elapsed between the date of entry of the District Court's judgment and the effective date of the judgment, the Board of Parole revoked petitioners' paroles. This action constituted the final administrative action which the Government

[24] The Seventh Circuit, in the *De Lucia* case, reached the same conclusion as that reached by the District Court in the case at bar.

had insisted, thus far unsuccessfully, was a condition precedent to petitioners' right to challenge the validity of their detention judicially. The Government, accordingly, immediately petitioned the District Court to reconsider its judgment directing petitioners' discharge in the light of the change in their status from parolees held under warrants charging parole violation to ex-parolees held under the original commitments themselves. The evident purpose of the filing of the motions for reconsideration was, of course, to reopen the habeas corpus proceedings, thus far premature in the Government's view, but now ripe for consideration, in order to afford the Government the opportunity to refute petitioners' claims that the Board of Parole had been acting arbitrarily. The District Court, however, summarily denied the Government's motions, stating that "If the motions were granted, there is no reason to suppose that upon reconsideration the Court would be met with anything but silence similar to that encountered at the hearings already had and nothing would be gained" (*supra*, pp. 26–27).[25]

It was this action of the District Court which the majority of the Court of Appeals held erroneous. As we have pointed out (*supra*,

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[25] An independent ground assigned by the court for its refusal to grant the motions for reconsideration was that the revocation orders had been issued "without fair hearings" (*supra*, p. 27). Questions relating to this aspect of the case are discussed in point II, *infra*, pp. 49–92.

pp. 27–28), the majority below did not find it necessary to decide whether the District Court was right or wrong in entering its orders of December 4, 1948, directing petitioners' discharge. In the opinion of the majority, the intervention of the parole-revocation orders between that date and the date as of which the discharge orders were to become effective effectually mooted the issue of the legality of petitioners' prior detention under the warrants. We submit that this view is correct. Prior to the revocation of their paroles, petitioners were parolees arrested and held under warrants charging them with parole violation. Upon the revocation of their paroles, the nature of their status was changed. They were then no longer parolees detained merely on charges of parole violation, but convicts imprisoned under the authority of the original convictions and commitments. Their new status was comparable, as pointed out by the majority (R. 274–275), to that of aliens held under deportation orders, or defendants convicted or held for trial under indictments, whose original arrests may have been in some manner irregular. It is well settled that a defect or irregularity in the mode of arrest is not open to attack in such cases. See *Albrecht* v. *United States,* 273 U. S. 1; *Bilokumsky* v. *Tod,* 263 U. S. 149, 158; *Stallings* v. *Splain,* 253 U. S. 339, 342–343; *Kelly* v. *Griffin,* 241 U. S. 6, 12–13; *In re Johnson, Petitioner,* 167 U. S. 120, 125–127;

Iasigi v. *Van De Carr*, 166 U. S. 391; *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 662; 22 C. J. S., *Criminal Law*, § 144; 14 Am. Jur., *Criminal Law*, § 219.

But, an argument never before made is now advanced by the petitioners, in their brief on the merits before this Court (pp. 3, 5, 13–16), to the effect that after the district judge held the parole violator warrants "void and jurisdictional" and rendered judgment granting habeas corpus, the Parole Board was without power to continue with the administrative proceeding which, within fifteen days of the entry of judgment, resulted in certificates of parole revocation. A corollary of this argument is also asserted—that the district judge's view of the warrant as "void and jurisdictional" had become the "law of the case". Consequently, the argument apparently goes, he, the Court of Appeals, and this Court were and are powerless to question that determination by even considering the validity of the final revocations.

Had the district court in this case specifically enjoined the Board of Parole from proceeding to consider and decide the question whether petitioners' paroles should be revoked, that injunction would have been plainly reversible as in violation of the doctrine of exhausion of administrative remedies under *Securities and Exchange Commission* v. *Otis & Co.*, 338 U. S. 843, reversing 176 F. 2d 34 (C. A. D. C.). Petitioners certainly cannot be in a better position simply because no specific injunc-

tion was issued. And their argument loses all force when it is noted, additionally, that the Parole Board whose proceedings petitioners would deem to have been enjoined, was and is not a party to this habeas corpus action. Any suggestion that the district judge's ruling in this case operates under the doctrine of *res judicata* to bar the warden's alleged privy (Br. 16), the Parole Board, from consideration of whether petitioners had in fact violated the terms of their parole, must give way to the well-established rule that "No discharge by writ of *habeas corpus* will operate as a bar to further proceedings in the same cause, unless the inquiry on the petition for writ involves a full investigation into the merits of the case—the guilt or innocence of the accused." *Morse* v. *United States*, 267 U. S. 80, 85, quoting *Benson* v. *Palmer*, 31 App. D. C. 561, 568, with approval. See also *United States* v. *Levy*, 268 U. S. 390. It is clear that the trial judge, in this habeas corpus proceeding, did not pass on the question whether petitioners had in fact violated their paroles.[26]

If, then, the doctrine of *res judicata* is inoperative to bar determination by the Board of Parole as to whether the paroles should be revoked, the more flexible rule of "law of the case" can hardly bar consideration by the courts of the validity of those

[26] As Judge Underwood said (R. 247), "It was not a question of violation of parole, but a question of possession of information by Judge Rogers. It is an attack on the validity of the warrants, not on the exclusive right of the Board to pass upon the question of parole."

revocations. "In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power * * *. Of course, this court, at least, is free when the case comes here." *Messenger* v. *Anderson,* 225 U. S. 436, 444 (per Mr. Justice Holmes). Nothing in the trial court's findings and conclusions (R. 242–250) leading to the grant of habeas corpus nor in his order denying reconsideration (R. 253–254) suggests that he felt constrained by what he had already decided from considering the validity of the revocations finally entered. Such aversion as he exhibited to further consideration was no more and no less than that of any court confronted with a motion for reconsideration. In any event, his "law of the case", was neither the Court of Appeals' nor this Court's "law of the case." See *White* v. *Higgins,* 116 F. 2d 312, 317 (C. A. 1) (per Magruder, C. J.).

Upon the issuance by the Board of Parole of the orders revoking the paroles, thus mooting the question of the legality of petitioners' prior detention under the arrest warrants, the issue properly before the District Court, consequently, was the legality of petitioners' detention under the revocation orders, or, in other words, the validity of these orders, as the majority below, correctly in our opinion, held. And since the District Court, as the majority said, "did not try at all

the Warden's pleading presenting the orders of revocation, but hastily condemned them" (R. 276), it was proper for the court below to reverse the District Court's orders discharging petitioners, and to remand them to custody "with leave * * * to enlarge their pleadings so as to present, if they can, a case of total nullity" of the revocation orders (R. 276–277; *supra*, p. 28).[27]

[27] Petitioners contend that they are already reinstated parolees and that these causes are therefore moot (Br. 7, Pet. 130–137), but the contention is plainly insubstantial. They base their argument on the fact that in April 1949—after they had been released on habeas corpus, and while the Government's appeal from the orders of discharge was pending in the Court of Appeals—they were directed by the Board of Parole to consider themselves in parole status and to resume the submission of monthly reports, with which direction they have been since complying (see R. 262–264). But the argument assumes, as petitioners concede it must (Pet. 132), that the Parole Board has abandoned the revocation proceedings and acquiesced in the District Court's orders discharging them. Obviously, this is not the case. The Parole Board has revoked their paroles and, so far as it is concerned, petitioners are ex-parolees who would now be serving the balance of their prison terms but for the District Court's orders releasing them, which orders were successfully challenged on appeal. Clearly, the Board's decision in April 1949 to direct the resumption by petitioners of the filing of monthly reports, *as though* they were still (or again) in parole status, in no way evidenced an intention on the part of the Board to acquiesce in the discharge orders, appeal from which was then pending. It is to be noted that petitioners also advanced this "mootness" argument in a motion in the Court of Appeals to dismiss the Government's appeal (R. 262–266), and that that court found so little merit in the argument that it made no mention of it either in its main opinion (R. 269–277) or in its supplementary opinion (R. 285) denying petitioners' motion for rehearing (R. 281–283), in which the argument was renewed (R. 282).

Under this qualified judgment of reversal and remand, it is now open to petitioners to amend their pleadings so as to allege that the revocation orders are totally void because issued arbitrarily, without evidence or information of parole violation. It is difficult to see how petitioners can have any valid objection to this disposition of their case. If they amend their pleadings in the manner permitted by the Court of Appeals' judgment, and if the Government fails to contradict their allegations of arbitrary and capricious action, they will be immediately entitled to their liberty as reinstated parolees.[28] If, on the other hand, the Government contradicts the charges of arbitrariness, it will then be incumbent on it to satisfy the District Court that the Board of Parole does have information supporting the charges of parole violation and so did not act arbitrarily in revoking the paroles.[29] In either event, peti-

[28] Because, as the record has developed in these cases, the validity of the Parole Board's revocations appears to depend solely on whether or not there is any factual basis whatever for the finding that petitioners violated the terms of their paroles, the Government has not challenged the judgment of the court below permitting judicial inquiry on that issue. It does not follow that in other cases bearing more directly on the permissible area of the Parole Board's complete discretion, Parole Board orders can properly be subjected to judicial review. See also note 29, *infra*.

[29] Of course, it will not be open to the District Court to inquire into the "reliability" of such information of parole violation as the Board of Parole may have; its function will be limited to ascertaining that the Board does have some information, and so did not act arbitrarily. *Fox* v. *Sanford*,

tioners will have received all that they can legitimately demand.

II

The applicable statutory and constitutional hearing requirements were fully met by the "opportunity" given petitioners "to appear" before the parole authorities

Congress has provided (18 U. S. C. [1946 ed.] 719, Appendix, *infra*, pp. 97–98) that—

> When a prisoner has been retaken upon a warrant issued by the Board of Parole, *he shall be given an opportunity to appear before said Board of Parole, a member thereof, or an examiner designated by the Board.* The said Board may then, or at any time in its discretion, revoke the order and terminate such parole or modify the terms and conditions thereof. * * * [Italics supplied.]

In this case, petitioners were allowed to appear before two members of the Board of Parole on September 8, 1948, in Atlanta Penitentiary, where they were questioned relative to the charges of

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123 F. 2d 334, 335 (C. A. 5); *Rogoway* v. *Warden*, 122 F. 2d 967, 968–969 (C. A. 9), certiorari denied, 315 U. S. 808; *Christianson* v. *Zerbst*, 89 F. 2d 40, 42 (C. A. 10); *Bass* v. *Hiatt*, 50 F. Supp. 420, 422 (M. D. Pa.). Judge Underwood, indeed, as we have pointed out (*supra*, p. 24), has indicated in the proceedings in this case his awareness of this limitation on the judicial inquiry (R. 203, 206, 244). And, obviously, the wisdom of the Board's action in revoking the paroles is beyond the scope of any judicial investigation, since the statute (18 U. S. C. [1946 ed.] 719, Appendix, *infra*, pp. 97–98) commits the question of whether a parole should be revoked, or its terms modified, to the discretion of the Board.

parole violation made against them. The proceedings were transcribed for the future use of the Board in its deliberations concerning whether the paroles should be revoked or allowed to remain in effect. But the Board, pursuant to its administrative practice, declined to permit counsel to be present and to represent petitioners at these appearances, though it did express willingness to hear counsel orally or in writing at its headquarters in Washington and to receive "any material or information bearing on these cases." The Board likewise refused petitioners' and their counsel's requests that they be accorded the right to produce witnesses in defense against the charges of parole violation, to be confronted by and cross-examine witnesses claiming to know of any instances of parole violation by petitioners, and to be furnished, at their expense, with transcripts of the proceedings. See *supra,* pp. 6–22. Petitioners here renew their contentions, made throughout the proceedings below, that they were entitled as of right to be accorded these considerations, and that the Board's refusal to grant them these rights rendered the orders revoking their paroles illegal and void (Br. 10–11, 13). They base their contentions on the Federal Parole Act itself, *i. e.,* the italicized portion of the above-quoted 18 U. S. C. [1946 ed.] 719; on *Fleming* v. *Tate,* 156 F. 2d 848 (C. A. D. C.), which construed an analogous provison of the District of Columbia Parole Act; on certain provisions of the Administrative Procedure

Act of June 11, 1946 (Appendix, *infra*, pp. 99–107); and the requirements of due process (Pet. 47–49, 98–130).

A. The Federal Parole Act does not require a formal hearing, including the right to be represented by counsel, in parole-revocation proceedings

1. *The language of the Federal Parole Act and the nature of parole.*—It should be noted, first, that Congress did not use the word "hearing" in the parole-revocation provisions of the Federal Parole Act (18 U. S. C. [1946 ed.] 719, *supra*, p. 49); it said "opportunity to appear." While it is obvious, of course, that Congress contemplated something more than the mere "physical presence" of the parolee (*Fleming* v. *Tate*, 156 F. 2d 848, 850 (C. A. D. C.)), it by no means follows that anything in the nature of a full-dress hearing, or trial, was contemplated. See Belshaw, *Elements of Hearing in Revocation of Parole Proceedings*, 37 Journ. of Crim. Law and Criminology 308. " 'Appearance' in the law has several significations, and the word must always be understood in reference to the particular business or subject-matter to which it relates" (1 Pope, *Legal Definitions*, p. 92).

A person who is charged with violating the criminal laws of the Federal Government is entitled to a judicial trial with all its traditional trappings—the unanimous verdict of a jury of twelve, the assistance of counsel, presumption of innocence, proof beyond a reasonable doubt, etc.

But the nature of the hearing to be accorded, for example, to a prisoner charged with violating prison regulations—on the outcome of which will depend such matters as whether he will forfeit accumulated "good time," be deprived of prison privileges, etc.—may obviously be less formal and less surrounded by safeguards usually associated with a judicial trial, without, on the other hand, being "unfair."

It is submitted that Congress, in requiring that the parolee accused of parole-violation be given an "opportunity to appear" before the Board of Parole, a member thereof, or an examiner designated by the Board before parole could be revoked, had in mind a hearing more akin to the latter type than to a formal trial. It must not be forgotten that a parolee is, in contemplation of law, still a prisoner. *Anderson* v. *Corall,* 263 U. S. 193, 196. He has had his day in court, and his sentence of imprisonment is still unserved. Parole is a thing of grace and not of right. Indeed, to a very large extent, the relationship between the Board and the parolee is the same as that between a warden and a convict still confined. Parole is not the end of punishment; it is part of it. A parolee is simply a prisoner whose permitted area of movement has been enlarged beyond the prison walls. See National Commission on Law Observance and Enforcement, *Report on Parole* (1931), pp. 129–130. While the parolee is on parole, he is, as it were, a ward, or charge,

of the Parole Board, whose paramount interest lies in rehabilitating him. The Board stands *in loco parentis* in relation to him.

In authorizing a prisoner's release on parole, the Board determines that there is a "reasonable probability" that he will "live and remain at liberty without violating the laws" and that his release is "not incompatible with the welfare of society" (18 U. S. C. [1946 ed.] 716, Appendix, *infra*, p. 94). It is therefore to the interest of the Board as well as to the interest of the parolee that the latter make good on parole. For these reasons, the Board will not normally terminate his parole unless there is good reason for so doing. And, even in a case of clear violation, revocation of parole does not necessarily follow since, considering all the manifold factors (see *Williams* v. *New York*, 337 U. S. 241, 246–250), the Board may deem revocation the least appropriate measure. See *infra*, p. 56.

It is entirely reasonable to assume, therefore, in view of this special relationship between the Board and the parolee, that Congress no more intended the "guardian" to conduct a formal or legal hearing concerning the behavior of its "ward" than it would require a warden to accord such hearing before changing the status, *in prison*, of one of the inmates. Congress merely intended that the Board should investigate carefully and give the alleged offender an opportunity to explain why and to what extent he has mis-

behaved. These considerations, it is submitted, contradict the idea that Congress ever intended the parolee's "appearance" before the Board to be anything resembling a formal court proceeding.

Our interpretation, as outlined above, of what Congress had in mind when it directed that the parolee be given an "opportunity to appear" before the Board of Parole prior to revocation of his parole, is persuasively supported, we submit, by the following excerpt from 4 *Attorney General's Survey of Release Procedures* (1939), pp. 245–248, reviewing the practices of the states with reference to parole-violation hearings, and the reasons for conducting such hearings:

> *Hearings on the violation of parole.*— In general hearings at which the nature and circumstances of the violation are discussed, and at which the alleged violator is given an opportunity to present his side of the story, are discretionary with the paroling authorities. Parole authorities in many of the States, however, make it a practice to hold hearings on violations in order to avoid the possibility of unjustly revoking parole on the basis of what may have been bias or faulty judgment on the part of parole or peace officers.
>
> The States can be divided into two general categories in relation to the practice of holding hearings on violations: (1) States in which violators are heard: Arizona, California, Delaware, District of

Columbia, Illinois, Indiana, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New York, New York City, North Dakota, Pennsylvania, Texas, Washington, and the Federal parole system, and (2) States in which parole violators are returned automatically to prison without hearing on the question of violation: Alabama, Colorado, Florida, Georgia, Iowa, Louisiana, Maryland, Missouri, Montana, Nebraska, New Mexico, North Carolina, Oklahoma, Oregon, Tennessee, South Dakota, West Virginia, Wisconsin, and Wyoming.

* * * * *

In practically every instance, the hearing on a parole violation is merely a formality to permit the returned violator to give his version of the events which led up to the revocation of his parole. As far as the parole authorities are concerned, the facts justifying the revocation of the parole almost invariably are clearly established before the time of (or concurrent with) the return of the offender to the institution.

A question naturally arises as to the advisability of holding these hearings which consume the time of men already overburdened with work. The answer to this objection is threefold: In the first place, the possibility exists that the parole agent was overhasty in his action in returning the parolee as a violator. Parole agents are human, and it is possible that friction

between the agent and parolee may have influenced the agent's judgment. In fairness to the violator, this is a possibility which should be investigated by some higher authority. The hearing is of special importance in those States in which the sponsorship system of supervision exists, since there have been numerous instances in which sponsor-employers "sweated" the parolees in their custody unmercifully under threat of declaring them parole violators on trumped up charges.

Another reason for holding a hearing is that often the true psychology of the parolee precedent to the commission of the violation is revealed. The trend of the parolee's thought in trying to rationalize his behavior may afford clues to his mental and emotional make-up which will be useful in effecting his future adjustment in society.

Third, the hearing is an opportunity for the violator to discuss his behavior and to have it analyzed by men who, by virtue of the positions they occupy, necessarily have an interest in his future behavior. If, through his own statements, a parole violator can be made to see how irrationally he has acted, and how twisted his thinking has been; if, as often is the case, he can be led to see himself as ridiculous or foolish by his own statements, a long step toward his ultimate rehabilitation may have been taken.

* * * * *

> It sometimes is argued that a parolee is entitled to legal representation at hearings on parole violations, but as the legal status of a parolee is exactly the same as though he were still incarcerated, the prevailing opinion is that his return to prison is an administrative prerogative of the authorities and that he has no legal grounds upon which to base his protest against such a return. By the same reasoning, if his return is effected through the properly authorized channels, he has no vested right to a formal hearing on the matter of his violation.

It is highly significant, we submit, that many states do not accord alleged parole violators hearings at all, and that of those which do provide for hearings, none requires anything in the nature of a formal hearing, or trial of the charges.

2. *The administrative construction and practice.*—From 1910, when the Federal parole system was established, until 1930, there was a separate parole board for each Federal penitentiary; from 1930 to the present, there has been a single Board of Parole having parole powers with respect to all Federal prisoners throughout the country. See Appendix, *infra,* pp. 95–96, fn. 6. Throughout these forty years of administering the parole laws, the parole boards have consistently and uniformly construed the "opportunity to appear" provision of 18 U. S. C. [1946 ed.] 719 as not requiring a formal hearing on parole-violation charges of the

type petitioners demand. "Federal Boards of Parole have uniformly assumed, in the absence of any statutory provision to the contrary, that representation by counsel, taking of formal testimony, confrontation of witnesses, and other proceedings usually associated with criminal trials were not necessary to the determination by the Board as to whether the welfare of society would be promoted by the granting, revocation or modification of parole." (Letter of August 6, 1948, from the Chairman of the Board of Parole to Mr. Stewart, counsel for petitioners, *supra*, p. 8; R. 216, 222–223.) See also Regulations of the Board of Parole, 28 C. F. R., §§ 2.13 and 2.14. This long-standing, uniform administrative construction, by the agency established by Congress to administer the parole laws, is entitled to great weight in ascertaining the true meaning of the "opportunity to appear" clause. *Hirshberg* v. *Cooke*, 336 U. S. 210, 217; *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 351–352; *Neuberger* v. *Commissioner*, 311 U. S. 83, 89; *Estate of Sanford* v. *Commissioner*, 308 U. S. 39; 49–50; *Bowen* v. *Johnston*, 306 U. S. 19, 29–30; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 84; *Brewster* v. *Gage*, 280 U. S. 327, 336; *United States* v. *Jackson*, 280 U. S. 183, 193.

Moreover, this administrative construction would appear to have received implicit congressional sanction and approval in the 1940 amend-

ment of Section 6 of the Act of June 25, 1910 (this section being the section of the original 1910 Act, establishing the federal parole system, on which 18 U. S. C. [1946 ed.] 719 is based). While changing Section 6 in another respect,[30] Congress chose not to modify the "opportunity to appear" language. Since it must have been aware of the hearing procedures then (as now) in use by the Parole Board and any alleged inadequacies would have presented themselves for congressional correction, the absence of corrective language can fairly be taken as approval. *United States* v. *Wyoming*, 331 U. S. 440, 452–453; *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 500, and cases cited.

3. *The legislative history of 18 U. S. C. [1946 ed.] 719.*—The legislative history of 18 U. S. C. [1946 ed.] 719 supports the view that Congress, in specifying that a parolee rearrested on parole-violation charges be given an "opportunity to appear" before the Board of Parole prior to revocation of the parole, never contemplated that he should be given a formal hearing with all the normal incidents of a trial on the charges, but merely that he should be granted an informal appearance, the nature and extent of which would be left to the Board's discretion.

[30] The court below has suggested (R. 275) that such change as was made in the section fortifies the conclusion that Congress intended no proceeding in the nature of a trial.

The section in question is based on Section 6 of the Act of June 25, 1910, c. 387, 36 Stat. 820, which read in pertinent part, and in substantially the same language as at present, as follows:

> At the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before said board of parole, and the said board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof. * * *

The bill which became the 1910 Act was S. 870, 61st Cong. Section 6 of this bill, in its original form, had provided in pertinent part, and in substantially the same language as that set forth above, as follows (see *Senate Bills,* vol. 299, part 2 ["Senate Bills, 61st Congress. Nos. 861–1360"]):

> At the next meeting of the board of parole, held at such prison, after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison he shall be given an opportunity to appear before said board of parole, and the said board may, after such opportunity has been given, or in case said prisoner has not been

> returned, declare said prisoner to be a delinquent and bond forfeited, and he shall, whenever arrested by virtue of said warrant, be thereafter imprisoned in said prison for the unexpired term of sentence of such prisoner at the time the delinquency is declared * * *.

The bill was reported from the Senate Judiciary Committee without amendment, and without a written report (45 Cong. Rec. 102), and subsequently passed the Senate without amendment (45 Cong. Rec. 1532).

The House Judiciary Committee, in reporting out the bill as thus passed by the Senate, amended it by striking it out in its entirety except for the enacting clause and substituting a new bill. See H. Rep. 1341, 61st Cong., 2d sess., p. 1. The section of the House Committee's proposed substitute bill which corresponded to Section 6 of the Senate bill, *supra,* was Section 4. It provided in pertinent part (*id.,* p. 2):

> At any time during the period of parole the board by which the prisoner was released may, in its discretion, revoke the order and terminate such parole or modify the terms and conditions thereof. * * *

It is to be noted that the House Committee's substitute bill eliminated entirely the requirement that the parolee be given an "opportunity to appear" before the Parole Board prior to revocation of parole, and made the revocation of parole entirely discretionary with the Board. The Com-

mittee's explanation of its proposed substitute bill made it clear that, under the bill, "[t]he board may at any time revoke any order or parole or modify its conditions" (*id.*, p. 3).

The House Committee's substitute bill passed the House without amendment (45 Cong. Rec. 6377) following brief consideration on the House floor (*id.* 6373–6377), during which it was pointed out that, under the bill, parole would be "revocable at any time that this parole board may elect to revoke it" (*id.* 6374).

Thereafter, the Senate disagreed to the House amendment of its bill (substituting a new bill), the House insisted on its amendment, and conferees were appointed (45 Cong. Rec. 6773, 7103). The bill which emerged from the conference consisted of ten sections, of which seven were taken from the bill as passed by the Senate, and three from the House's substitute bill. See H. Rep. 1701, 61st Cong., 2d sess. [Conference Report], p. 5. Among the seven sections taken from the Senate bill, in slightly modified form, was Section 6, *supra*, pp. 60–61, which contained the "opportunity to appear" language (*id.*, pp. 2, 5). The "Statement of Managers on Part of the House" (*id.*, p. 5) stated:

> The report is of an amended bill, of which the first six sections and the last section are amended from the Senate act, and sections 7, 8, and 9 are substantially sections 5, 6, and 7 of the House substitute.

> The board of parole is made up substantially as recommended by the Senate. The time that the prisoner must serve before parole and the provisions for parole officers, gratuities, and as to prisoners in state reformatories are adopted from the House substitute. The Senate requirement of a bond and the House provision for advertisement of applications for parole are omitted. *The rest of the substitute is substantially common to both bills, the language only being varied.* [Italics supplied]

For present purposes, the significant language of the Conference Report is that in italics, *supra.* The conferees considered Section 6 of the original Senate bill (requiring that a parolee be given an "opportunity to appear," etc., before parole could be revoked) and Section 4 of the House substitute bill (making parole-revocation entirely discretionary with the Board, without the necessity of according the parolee an "opportunity to appear") to be "substantially" identical provisions. It is inconceivable that the conferees would have thus described these sections if the "opportunity to appear" provision of Section 6 of the Senate bill had ever been intended to connote a formal hearing with all the accoutrements of a trial.

The Conference Report, including the above-quoted "Statement of Managers on Part of the House," was thereafter read in the House (45 Cong. Rec. 8834–8835) and agreed to without further debate (*id.* 8911). It was likewise read in

the Senate and agreed to without further debate (*id.* 8873–8874). The conference bill thus was enacted into law.

For the foregoing reasons, it is submitted that the legislative history of Section 6 of the Act of June 25, 1910, on which 18 U. S. C. [1946 ed.] 719 is substantially based, provides affirmative evidence that Congress never contemplated that the "opportunity to appear" clause required a full-dress hearing of the type petitioners demand.

4. *Extrinsic evidence of the legislative intent: Congress' failure to equip the Board of Parole with the necessary machinery for conducting formal hearings.*—It is evident that any board or other administrative body concerned with convicts and their associates, in order to be able to conduct the type of formal hearing to which petitioners insist they are entitled, must have the power to issue subpoenas, authorize the payment of witnesses' transportation expenses, and require that the testimony of witnesses be given under oath or affirmation. The Board of Parole has none of these powers.[31] False testimony by

[31] Nothing in the Administrative Procedure Act is construable as conferring such powers on any administrative agency. Section 6 (c), *infra*, p. 102, provides that "Agency subpenas *authorized by law* shall be issued to any party upon request * * *" [italics supplied]. And Section 7 (b), *infra*, p. 103, provides that "Officers presiding at hearings shall have authority, subject to the published rules of the agency and *within its powers*, to (1) administer oaths and affirmations, (2) issue subpenas *authorized by law*, * * *" [italics supplied]. But the italicized words make it clear

a witness before the Board would not be punishable as perjury.[32] Nor, by the same token, would a parolee charged with parole-violation who adduced false testimony by a witness on his behalf at his appearance before the Board be guilty of subornation of perjury. The sanction of the possibility of a perjury prosecution for the giving of false testimony is indispensable to a formal hearing or inquiry into the conduct of persons already convicted of crimes because of the substantial risk of false testimony by the parolee and the criminal elements with whom he may be involved.

The Board's lack of the subpoena power is an equally hampering obstacle to the conduct of a formal hearing. Where the alleged parole-viola-

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that the Act does not purport to confer subpoena and oath-administering powers on any agency. Section 6 (c), *supra*, means merely that *if an agency already has subpoena powers under existing law*, subpoenas shall be issued to any party on request. Similarly, Section 7 (b), *supra*, means merely that *if an agency already has subpoena and oath-administering powers under existing law*, subordinate hearing officers may exercise such powers. The legislative history of these subsections of the Act confirms this interpretation. See Sen. Doc. No. 248, 79th Cong., 2d sess. ("Administrative Procedure Act, Legislative History"), pp. 29–30, 363. See also *Attorney General's Manual on the Administrative Procedure Act*, pp. 67, 74–75, which further corroborates this construction of the subsections.

[32] Perjury is defined as wilful falsification of testimony under oath "before a competent tribunal, officer, or person, in any case in which *a law of the United States authorizes an oath to be administered*" [italics supplied] (18 U. S. C. [1946 ed.] 231; now 18 U. S. C. 1621).

tor produced witnesses in his behalf, it would inevitably be necessary for the Board to call witnesses who could establish the violation. Many such witnesses would be reluctant to appear voluntarily to testify against the parolee because of fear of bodily harm from the prisoner in reprisal for any testimony they might give against him. Since the Board lacks the power, possessed by a court, to compel the attendance of such witnesses, its ability to establish the parole-violation charged would in many cases be nullified or seriously impaired. The Board's lack of power to authorize the compensation of witnesses for transportation expenses incurred in their travel to the place of the hearing is another, equally evident obstacle to the conduct of the type of hearing to which petitioners claim they have a right.

If it had been the intent of Congress, in directing that a parolee rearrested as a parole violator should have an "opportunity to appear" before the Board before parole could be revoked, to guarantee to the parolee the sort of formal hearing now insisted upon by petitioners, provision would certainly have been made in the parole laws to equip the Board with the machinery essential to that end. The failure of Congress to provide the necessary machinery is strong evidence that Congress contemplated no such formal proceeding.

5. *Argument from analogy based on the nature of the hearing required in probation-revocation cases.*—Aid in ascertaining the legislative intent

embodied in the "opportunity to appear" requirement in parole-revocation proceedings may be sought from consideration of the type of hearing required in probation-revocation proceedings, as defined by this Court in *Burns* v. *United States*, 287 U. S. 216, and *Escoe* v. *Zerbst*, 295 U. S. 490. Probation, of course, serves much the same purpose as parole, the principal difference being that the probationer's sentence is suspended *ab initio*, by the sentencing court, whereas the parolee is released by the Parole Board after serving part of his sentence.

The federal probation system was established by the Act of March 4, 1925, c. 521, 43 Stat. 1259–1261 (18 U. S. C. [1946 ed.] 724–727). Section 1 authorized courts of the United States, following a defendant's conviction of, or plea of guilty to, any crime not punishable by death or life imprisonment, "to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best," the probation period not to exceed five years. Section 2 contained the provisions respecting revocation. It provided in pertinent part:

> At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. *Thereupon such probationer shall forthwith be taken before the court.* At any time after

> the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested *and brought before the court*. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed. [Italics supplied.] [23]

In *Burns* v. *United States, supra,* and *Escoe* v. *Zerbst, supra,* this Court held that, by virtue of the italicized language in the above-quoted section, a probationer was entitled to a hearing before the court before his probation could be lawfully revoked, but that the hearing could be summary in character, nothing in the nature of a formal hearing or trial being required. In the *Burns* case, Burns was sentenced to one year's imprisonment on one count of an indictment and to five years' imprisonment on another count. Execution of the five-year sentence was suspended and he was placed on probation with respect thereto. While serving the one-year sentence, he was brought before the court, charged with violating the terms of his probation under the five-year sentence. The charge was that, on various days during his service of the one-year sentence, having been granted temporary release from confinement in order to visit a dentist for nec-

[23] The quoted section was amended in 1933 (see 18 U. S. C. [1946 ed.] 725), but in respects not here relevant.

essary dental work, he abused the privilege by going to his home instead. Following a summary hearing, at which the court satisfied itself that the charges were true, his probation under the five-year sentence was revoked. Burns' counsel sought to adduce further evidence, but the request was refused. Burns challenged the validity of the revocation order, complaining of the summary character of the hearing. This Court said, however (287 U. S. at 219–222):

> Petitioner objects to the summary character of the proceeding. He urges that he was entitled to previous notice of specific charges of violation of the terms of probation and to *a hearing upon such charges according to the established rules of judicial procedure.* * * *
>
> The Federal Probation Act * * * confers an authority commensurate with its object. It was designed to provide a period of grace in order to aid the rehabilitation of a penitent offender * * *. Probation is thus conferred as a privilege and cannot be demanded as a right. It is a matter of favor, not of contract. There is no requirement that it must be granted on a specified showing. The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain. To accomplish the purpose of the statute, an exceptional degree of flexibility in administration is essential. It is necessary to individualize each case, to give that care-

ful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion. The provisions of the Act are adapted to this end. It authorizes courts of original jurisdiction, when satisfied "that the ends of justice and the best interests of the public, as well as the defendant, will be subserved," to suspend the imposition or execution of sentence and "to place the defendant upon probation for such period and upon such terms and conditions as they may deem best."

There is no suggestion in the statute that the scope of the discretion conferred for the purpose of making the grant is narrowed in providing for its modification or revocation. * * * There are no limiting requirements as to the formulation of charges, notice of charges, or manner of hearing or determination. No criteria for modification or revocation are suggested which are in addition to, or different from, those which pertain to the original grant. The question in both cases is whether the court is satisfied that its action will subserve the ends of justice and the best interests of both the public and the defendant. * * *

* * * * *

The question, then, in the case of the revocation of probation, is not one of formal procedure either with respect to notice or specification of charges or a trial

> *upon charges. The question is simply whether there has been an abuse of discretion, and is to be determined in accordance with familiar principles governing the exercise of judicial discretion.* * * * [Italics supplied.]

The *Escoe* case, *supra*, 295 U. S. 490, reaffirmed the principles of the *Burns* case. There, the court which had placed Escoe on probation revoked the probation without any hearing whatever, upon its *ex parte* determination that he had violated the terms of probation, the court's finding having been based on a report by the probation officer. While this Court nullified the revocation order because of the failure to hold any hearing whatever, it pointed out, nevertheless, that only a summary hearing was required. It said (295 U. S. at 493):

> * * * Clearly the end and aim of an appearance before the court must be *to enable an accused probationer to explain away the accusation* [of violation of the terms of probation]. The charge against him may have been inspired by rumor or mistake or even downright malice. *He shall have a chance to say his say* before the word of his pursuers is received to his undoing. *This does not mean that he may insist upon a trial in any strict or formal sense.* [Citing *Burns* v. *United States*, *supra*.] *It does mean that there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the*

conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper. * * * [Italics supplied.]

We submit that the above-quoted description of the purpose and scope of the probation-revocation hearing is equally applicable to the parole-violation hearing. The alleged parole violator, like the alleged probation-violator, must be given the opportunity to "explain away the accusation" and to "say his say," but, on the other hand, "[t]his does not mean that he may insist upon a trial in any strict or formal sense."

6. *The right to counsel and witnesses and* Fleming v. Tate.—Petitioners cite *Fleming* v. *Tate,* 156 F. 2d 848 (C. A. D. C.) as authority for their contention that they were entitled, at their appearances before the Parole Board, to be represented by counsel and to adduce testimony on their behalf in defense against the charges of parole violation (Br. 10). That case involved construction of Section 24–206 of the District of Columbia Code (1940 ed.). This Code section, based upon Section 6 of the District of Columbia Indeterminate Sentence and Parole Act of July 15, 1932, c. 492, 47 Stat. 696, 698, contained the revocation-of-parole provisions applicable to the District of Columbia parole system established by that Act. It provided, in pertinent part, and in

language substantially identical with that of the corresponding section of the Federal Parole Act (18 U. S. C. [1946 ed.] 719), as follows:

> At the next meeting of the Board of Indeterminate Sentence and Parole held after the issuing of a warrant for the retaking of any paroled prisoner, said board shall be notified thereof, and if such prisoner shall have been returned to the institution, he shall be given an opportunity to appear before said Board of Indeterminate Sentence and Parole, and the said board may then, or at any time in its discretion, revoke the order and terminate such parole or modify the terms and conditions thereof * * *.

Tate, having been paroled after serving 16 years of a 40-year sentence for housebreaking and larceny, was arrested under a violator warrant charging that he had left the District without the written approval of the Board of Indeterminate Sentence and Parole, in violation of the conditions of his parole. Following an appearance before the Board, his parole was revoked. The opinion states that "When Tate was arrested, counsel who had theretofore represented him applied for leave to appear in his behalf at the hearing, and Tate's employer requested permission to testify. These requests were denied because the Board does not permit counsel or

witnesses to appear at these hearings" (156 F. 2d at 849). Tate thereupon petitioned for a writ of habeas corpus, challenging the legality of the order of revocation. The District Court granted the writ, held a hearing, and ordered Tate discharged without prejudice to subsequent proceedings for the revocation of the parole in conformity with the statute. The Court of Appeals, in affirming the decision, said (156 F. 2d at 849–850):

> The question is one of statutory construction. No constitutional right is involved, as parole is a matter of grace. The statute requires that after a paroled prisoner is arrested for violation of his parole, he "shall be given an opportunity to appear before said Board." The District Court held that this provision means an effective appearance, and thus necessarily means the presence of counsel if the prisoner so elects, and the receipt of testimony if he has testimony to present.
>
> The limits of this decision must be carefully and emphatically stated. Appellant urges that the presence of counsel would convert the hearing into a legal battle; that the reasoning of the court would apply to applications for parole; that the hearings would be prolonged; that it would follow that if the prisoner had no counsel an attorney would have to be assigned him; that the rules of evidence would be in-

voked; that the presence of a prosecutor would be necessary; and that "Without doubt there are other procedural problems, presently unforeseen, which would rear their heads to plague the parole system." Not one of these results is to be understood as following from our holding in this case. The same situation does not exist in applications for parole. The presence of counsel does not mean that he may take over control of the proceeding. The receipt of testimony offered by the prisoner need not be governed by the strict rules of evidence, any more than the application of those rules is necessary in many informal administrative hearings. The presence of counsel and the receipt of testimony offered by the prisoner need not prolong the hearing beyond the time necessary in any event for the Board to ascertain the facts upon which it is about to act. It is not necessary that counsel be assigned, as the requirement here is not jurisdictional. The statute requires an "opportunity" to appear, no more. *The participation by counsel in a proceeding such as this need be no greater than is necessary to insure, to the Board as well as to the parolee, that the Board is accurately informed from the parolee's standpoint before it acts, and the permitted presentation of testimony by the parolee need be no greater than is necessary for the same purpose.* But we believe that these minima are essential to a valid

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appearance before the Board as required by the statute. [Italics supplied.] "

"Following the Court of Appeals' decision in the *Tate* case, Congress passed "An act to reorganize the system of parole of prisoners convicted in the District of Columbia" (Act of July 17, 1947, c. 263, 61 Stat. 378). Section 5 of this Act amended the section of the District of Columbia Code which had been construed in *Fleming* v. *Tate* (§ 24–206, *supra*, p. 73) so as to make it read as follows:

"When a prisoner has been retaken upon a warrant issued by the Board of Parole, he shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board. *At such hearing he may be represented by counsel.* The Board may then, or at any time in its discretion, terminate the parole or modify the terms and conditions thereof. * * *" [Italics supplied].

It will be seen that, apart from purely phraseological changes, the amendment accomplished two things. It authorized "a member [of the Board], or an examiner designated by the Board," as well as the Board itself, to conduct the parole-revocation hearing—a change which had already been effected with respect to the Federal Parole Board in 1940 (see p. 31, fn. 19, *supra*). And secondly, it guaranteed the right of counsel at the hearing.

The legislative history of the amendatory Act indicates that the addition of the sentence guaranteeing the right of counsel at the parole-revocation hearing was in consequence of, and acquiescence in, the *Tate* decision, in so far as that decision held that a parolee was entitled to counsel at revocation hearings before the District of Columbia Board of Parole. The bill which became the amendatory Act, in its original form (H. R. 494, 80th Cong., 1st sess.) had provided: "* * * At such hearing he may, *in the discretion of the Board and under such rules as it may promulgate*, be represented by counsel. * * *" [Italics supplied]. See H. Rep. 451, 80th Cong., 1st sess., p. 5. The cited report contains (pp. 5–7) a letter from the Board of Commissioners of the District of Columbia to the Chairman of the House Committee on the District of Columbia explaining the purpose of the above-quoted proposed amendment. The letter

It is clear from the foregoing excerpt that the *Tate* decision is not at all an authority for the view that the Board of Parole must accord a parolee a formal hearing on the charges of parole violation. On the contrary, it holds that a summary and informal hearing suffices. It does hold that the parolee is entitled to counsel and to present testimony on his behalf, but even in these

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stated (*id.*, p. 6): "* * * The principal changes made in existing law are, * * *. Second, in the case of *Fleming* v. *Tate*, * * * it was held that, as the existing law provided that such a prisoner 'shall be given an opportunity to appear before said Board,' it was the intention of Congress to give him the right to be represented by counsel. Such a ruling was contrary to the administrative construction placed upon the act and also upon the similar Federal Parole Act which had been in existence since 1910. Under the present bill, it is provided that the prisoner, in the discretion of the Board, and under such rules as it may promulgate, may be represented by counsel. * * *" The proposed bill was reported favorably by the House District Committee without relevant amendment. H. Rep. 451, *supra*. The Senate District Committee, however, recommended that the words "in the discretion of the Board and under such rules as it may promulgate" be stricken, so that the sentence in question would read simply: "At such hearing he may be represented by counsel" (S. Rep. 373, 80th Cong., 1st sess.). The bill was finally enacted as thus amended.

Significantly, Congress has not undertaken to amend the Federal Parole Act in like fashion. Its failure to amend the Federal Parole Act so as to guarantee the right of counsel at revocation hearings, in the light of its specific amendment of the District of Columbia Parole Act to that end, indicates, if anything, that it is not yet ready to extend the guaranty of counsel to revocation hearings before the Federal Parole Board, which conducts such hearings throughout the country.

respects the holding is strictly qualified. The participation by counsel "need be no greater than is necessary to insure * * * that the Board is accurately informed from the parolee's standpoint before it acts, and the permitted presentation of testimony by the parolee need be no greater than is necessary for the same purpose." In the case at bar, the Chairman of the Board of Parole, as pointed out by the majority below (R. 275–276), formally notified petitioners' counsel, in his letter of August 6, 1948 (*supra*, pp. 7–9), that the Board would be glad to confer with counsel at its Washington offices, and to receive on petitioners' behalf, either in person or in writing, "any material or information bearing on these cases." "*Any* material or information" would certainly include affidavits or depositions by witnesses whose testimony petitioner might desire the Board to hear. We submit that, in view of this formal offer to counsel, the Board of Parole here accorded petitioner all the rights to which, under the *Tate* decision, he was entitled. As the majority below observed (R. 275–276), "The Chairman's formal offer to counsel that he appear before the Board in person or in writing and present what he desired, following the appearance in person of the prisoners before two members of the Board who heard and preserved the record of what they had to say, we think is a sufficient opportunity to appear."

In the *Tate* case, there does not appear to have

been any offer to counsel comparable to that made in the case at bar. The general language of the *Tate* opinion relative to the right to counsel and to adduce testimony must be read in the light of the absence, in that case, of this significant factor. In short, we submit that this case is distinguishable from the *Tate* case on this basis.

But if the *Tate* decision be read as standing for the broad rule that a parolee is *always* entitled to have counsel present *at the very hearing at which he himself appears* and to present testimony on his behalf *at that time*, so that the Board's offer to counsel in the present case to appear before the Board in Washington and present any relevant material or information on petitioners' behalf would not satisfy the requirements of the statute as construed in the *Tate* decision, we submit that that decision is wrong. The basic question is whether petitioners were accorded an "opportunity to appear" within the meaning of the statute. It cannot be successfully contended, we submit, that there is a denial of an "opportunity to appear" simply because counsel or witnesses are excluded from the hearing. See our arguments, *supra*, pp. 49–72, based upon the language of the pertinent statute, its legislative history, its consistent administrative interpretation, and various other relevant considerations, adduced in support of our contention that the "opportunity to appear," which Congress required before parole could be revoked, meant

simply an "opportunity" for the parolee to "say his say" to the Parole Board in defense against, or in explanation of, the charges of violation, or in extenuation of his conduct.

Even if it be assumed that there may be circumstances warranting the conclusion that the denial of a right to be represented by counsel, to be spoken for by another, or the exclusion of witnesses constitutes a denial of an "opportunity to appear",[35] there is no showing whatever in this case that petitioners were disadvantaged by the Board's refusal to admit counsel or witnesses to the hearing at which petitioners appeared, partic-

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[35] The Wickersham Commission's Advisory Committee on Parole only once mentions the question of attorney participation in parole board proceedings. It has this to say (National Commission on Law Observance and Enforcement, *Report of the Advisory Committee on Parole* (1931), pp. 303–304:

"The following is a short statement of the main deficiencies of parole as practiced generally in the United States: • • •

"3. Pleas of politicians, friends, fathers, mothers, brothers, and even attorneys employed by one or more of the aforementioned. It is a regulation of some paroling authorities that no oral arguments or statements, bespeaking parole for the offender, can be made before them; it is a practice of other paroling authorities to permit such statements to be made with little if any restriction or limit. Every paroling authority ought to seek all the facts available, but the practice of permitting friends of the offender to stand before the paroling authorities in person and beg the release of the offender and the reception of recommendations from influential politicians more often lead to bad decisions than to good. If parole be regarded as a continuation of treatment, such pleas seldom have any contribution to make."

ularly in the light of the Board's offer to hear counsel and receive relevant "material or information" at another time.[28]

This Court has sustained state convictions of serious crimes in which the accused was not represented by counsel. *Quicksall* v. *Michigan*, 339 U. S. 660; *Foster* v. *Illinois*, 332 U. S. 134; *Carter* v. *Illinois*, 329 U. S. 173; *Canizio* v. *New York*, 327 U. S. 82; *Betts* v. *Brady*, 316 U. S. 455. No one would maintain that the defendants in those cases were denied "opportunities to appear." *A fortiori*, a parolee is not denied an "opportunity to appear" simply because he is not represented by counsel.

B. The Administrative Procedure Act does not impose additional formal hearing requirements

1. *Parole revocation is not a "case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."*—Section 7 of the Administrative Procedure Act (Appendix, *infra*, pp. 102–104) is invoked by petitioners in support of their contention that they were entitled, at their appearances before the Parole Board on the parole-violation charges, to produce witnesses on their behalf, to cross-examine witnesses against them, and to be furnished

[28] Where by reason of "ignorance, youth, or other incapacity" (*Gibbs* v. *Burke*, 337 U. S. 773, 780), the parolee is unable himself to present his point of view to the Board of Parole, denial of representation might be deemed denial of an "opportunity to appear."

with transcripts of the proceedings. So far as is immediately pertinent, Section 7 provides:

> In hearings which section 4 or 5 requires to be conducted pursuant to this section—
>
> * * * * *
>
> (c) EVIDENCE.— * * * Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. * * *
>
> (d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. * * *

The validity of petitioners' contention thus depends, in view of the introductory clause of Section 7, *supra,* which limits the application of the entire section, on whether the appearances given parolees by the Parole Board on parole-violation charges, pursuant to 18 U. S. C. [1946 ed.] 719, are "hearings which section 4 or 5 requires to be conducted pursuant to" Section 7.

Section 4, having to do with "rule making," has no present relevance.[37] Consequently, the issue resolves itself into whether Section 5 (Appendix, *infra,* p. 101) applies to parole-revocation

[37] See the definitions of "rule" and "rule making" in Section 2 (c) (Appendix, *infra,* pp. 99–100).

appearances. See *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 48–51. Section 5 provides in pertinent part:

> In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * *—
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> * * * * *
>
> (b) PROCEDURE.—The agency shall afford all interested parties opportunity for * * * (2) * * * hearing, and decision upon notice and in conformity with sections 7 and 8.
>
> * * * * *

Thus, the applicability of Section 5 in its entirety—and consequently of Sections 7 and 8 as well—to any given administrative function or process depends upon whether that function or process is a "case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," within the meaning of the introductory clause of Section 5.

We assume that the Board of Parole is an "agency" within the meaning of the broad and comprehensive definition of that term in the Act.[39]

[39] Section 2 (a) (Appendix, *infra*, p. 99) defines "agency" as "each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia." But the Board of Parole is not once mentioned in the voluminous legislative history of the Act (see *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 36–40) as being subject to the Act's provisions (unlike a host of other agencies which are referred to by name as being generally covered by the Act).

And we may also assume for the moment, *arguendo,* that the parole-revocation process is an instance of "adjudication" within the definition of that term in the Act.[29] Hence, the validity of petitioners' contention turns on whether Congress, in requiring that every parolee who is retaken under a parole-violation warrant "be given an opportunity to appear before said Board of Parole, a member thereof, or an examiner designated by the Board" prior to revocation of parole (18 U. S. C. [1946 ed.] 719, *infra,* p. 97), contemplated "adjudication * * * on the record after opportunity for an agency hearing." We believe that Point A, *supra,* pp. 51–81, demonstrates that Congress intended no such adjudicatory process resulting in a decision based on a record; that the most that Congress intended was an informal, summary appearance at which the Board might meet the parolee face to face and hear what he has to say for himself in answer to the charges or in explanation or mitigation of his behavior. It is clear, we think, that Congress had no purpose to confine the Board to

[29] "Adjudication" is defined in the Act as "agency process for the formulation of an order (Section 2 (d), *infra,* p. 100), which, in turn, is defined as "the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing" (*ibid.*). Though this is indeed a broad definition, other provisions of the Act suggest that it has its limitations. See *infra,* pp. 86–89.

a record made at the time of the parolee's appearance before it; the Board was to judge the parolee as an individual, and his entire life, not one small segment revolving about an alleged parole violation, was properly to be considered.

2. *Section 6 (a) of the Administrative Procedure Act does not require that a parolee be permitted to be represented by counsel at his appearance before the Parole Board considering revocation of parole.*—We have sought to demonstrate that representation by counsel before the Board of Parole is not always and necessarily an essential ingredient of the "opportunity to appear" afforded the parolee by the Federal Parole Act. See *supra,* pp. 51–81. And we have, in that connection, referred to the consistent administrative practice and construction supporting that view. See *supra,* pp. 57–59. Nevertheless, petitioners seek to find in Section 6 (a) of the Administrative Procedure Act (Pet. 124–125) a reversal of that policy and a congressional direction that counsel be permitted to represent the parolee before the Board in all cases. This contention is advanced even though there is no evidence whatever that it occurred to anyone in the long consideration of the Administrative Procedure Act that the Parole Board and its operations might in any way be affected by the Act. See note 38, *supra,* p. 83.

We believe that a careful analysis of Section 6 (a) will serve to demonstrate that that which

was not contemplated was not unwittingly accomplished. The first three sentences of Section 6 (a) must be read and analyzed together, for in the differences in the language used appears the real meaning intended by its draftsmen. These sentences read as follows:

> Any *person compelled to appear in person* before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. *Every party* shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any *agency proceeding.* So far as the orderly conduct of public business permits, *any interested person* may appear before any *agency* or its responsible officers or employees for the presentation, *adjustment,* or *determination of any issue,* request, or controversy in *any proceeding* (interlocutory, *summary,* or otherwise) or in connection with any agency function. [Italics supplied.]

The first sentence of Section 6 (a) has no present application, for the parolee is not "compelled to appear" before the Board, being given by 18 U. S. C. [1946 ed.] 719, merely an "opportunity to appear." Appendix, *infra,* p. 97. In the second and third sentences are found the language differences which are believed to be controlling here. The second sentence, dealing with the right

of a "party" [40] in an "agency proceeding" [41] suggests a proceeding a good deal more formal than that of the Parole Board considering revocation of parole. See *supra*, pp. 51–81. That this is so is confirmed when these terms, in combination, are contrasted with those used in the third sentence. The third sentence refers not to "party" but to "any interested person"; it refers not to an "agency proceeding" but to an appearance "before any agency * * * for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding"; and the "proceeding" thus referred to is described as "interlocutory, summary, or otherwise." The differences between the language used in the second and third sentences are clearly the end product of a careful process of delineation; they reflect no mere use of synonyms but, rather, a shading in meaning that is here crucial. Compare Section 6 (a) as finally enacted with Section 6 (a) of the Senate Judiciary Committee Print of June, 1945. Sen. Doc. No. 248, 79th

[40] The section 2 (b) definition of "party" (Appendix, *infra*, p. 99) is not particularly helpful here since it reiterates the word "party" in the attempt at definition.

[41] "Agency proceeding" is defined in Section 2 (g), Appendix, *infra*, p. 100, as meaning "any agency process as defined in subsections (c), (d), and (e) of this section." Of the three subsections referred to, only two have possible relevance: Subsection (d), defining "adjudication," and (e), defining "licensing."

Cong., 2d Sess. ("Administrative Procedure Act, Legislative History"), p. 26.

Thus, the language in Section 6 (a) which is most aptly descriptive of Parole Board proceedings is the "summary" "proceeding" referred to in the third sentence. While the "agency proceeding" referred to in the second sentence and as broadly defined in Section 2 (g), Appendix, *infra*, p. 100, might literally apply to a Parole Board proceeding, that definition must, of necessity, be limited by the third category of proceedings described in the third sentence of section 6 (a). The parolee concerned with a revocation proceeding is more accurately described, also, as an "interested person" whose rights are defined by the third sentence rather than a "party" granted rights by the second. For, as has already been pointed out, *supra*, pp. 52–57, the parolee does not appear before the Board as an adverse "party"; the relationship is more in the nature of that which exists between "guardian" and "ward", and the "proceeding" more in the nature of an interview than an adjudicatory process.

It is sensible to conclude, then, that only the third of the first three sentences of Section 6 (a) is applicable to the Parole Board. And that sentence, in granting a right to "appear" "so far as the orderly conduct of public business permits", certainly adds nothing to the absolute "oppor-

tunity to appear" granted by the Federal Parole Act.[42]

C. The Constitution imposes no conditions on parole revocation

If, as we have sought to show, petitioners can find no support in either the Federal Parole Act or the Administrative Procedure Act for their contention that they were entitled to a formal hearing with counsel before their paroles could be revoked, their argument that a formal hearing is required must fail entirely. For the decisions of this Court make it clear that such rights as parolees may invoke must be derived from the applicable statutes, since the Constitution imposes neither substantive nor procedural requirements in this field.

In *Anderson* v. *Corall,* 263 U. S. 193, 196, this Court, discussing the status of a parolee under the Federal Parole Act, pointed out that "While on parole the convict is bound to remain in the legal custody and under the control of the warden until the expiration of the term * * *. While this is an amelioration of punishment, it is in legal effect imprisonment." So far as the Constitution is concerned, parole is of the same order as probation and, with respect to latter, this Court has said, through Mr. Chief Justice

[42] Whether and under what circumstances the "opportunity to appear" imports a right to representation by counsel is discussed *supra*, pp. 72–81.

Hughes (*Burns* v. *United States*, 287 U. S. 216, 220):

> Probation is thus conferred as a privilege and cannot be demanded as a right. It is a matter of favor, not of contract. * * * The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain.

In other words, this Court has squarely ruled that it cannot accept the "contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose." *Escoe* v. *Zerbst*, 295 U. S. 490, 492–493. The "source" of the privilege, Mr. Justice Cardozo continued for the Court, "is in the statute rather than in the Fifth Amendment." 295 U. S. at 493.

Being "a part of the course of treatment designed by the State for people who break the laws of the State,"[43] parole is, both legally and practically, a part of the sentence imposed on the convicted defendant. That being so, this Court's recent discussion of the procedures on sentence, even in a capital case, becomes particularly apro-

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[43] National Commission on Law Observance and Enforcement, *Report of the Advisory Committee on Parole* (1931), p. 298.

pos (*Williams* v. *New York*, 337 U. S. 241, 247–251):

> * * * modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.
>
> [It is] a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. * * * The practice of probation which relies heavily on non-judicial implementation has been accepted as a wise policy. Execution of the United States parole system rests on the discretion of an administrative parole board. * * *
>
> Modern changes in the treatment of offenders make it more necessary now than a century ago for observance of the distinctions in the evidential procedure in the trial and sentencing processes. * * * We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. * * * The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination. * * *
>
> The considerations we have set out ad-

monish us against treating the due process clause as a uniform command that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence. * * * The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX

A. The Federal Parole Statutes

At the time of the issuance of the parole-violation warrants here involved (July 21, 1948), the pertinent provisions of the federal parole statutes were as follows:[1]

> 18 U. S. C. [1946 ed.] 714.[2] *Parole of prisoners; conditions.*—Every prisoner who has been or may hereafter be convicted of any offense against the United States and is confined in execution of the judgment of such conviction in any United States penitentiary or prison, for a definite term or terms of over one year, or for the term of his natural life, whose record of conduct shows that he has observed the rules of such institution, and who, if sentenced for a definite term, has served one-third of the total of such term or terms for which he was sentenced, or, if sentenced for the term of his natural life, has served not less than fifteen years, may be released on parole as hereinafter provided. (Act of the June 25, 1910, c. 387, § 1, 36 Stat. 819, as amended

[1] The federal parole laws are now contained in §§ 4201–4207 of the 1948 revision and codification of Title 18 of the United States Code. This revision and codification became effective on September 1, 1948 (Act of June 25, 1948, c. 645, §§ 1, 20, 62 Stat. 683–858, 862), prior to the commencement, on September 2, 1948, of the habeas corpus proceedings here involved. However, the 1948 revision and codification introduced no relevant changes in the substance of previously existing law.

[2] Now 18 U. S. C. 4202. See fn. 1, *supra*.

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by the Act of January 23, 1913, c. 9, 37 Stat. 650.)

* * * * *

18 U. S. C. [1946 ed.] 716.[3] *Same; granting of parole; application; findings; terms and conditions;* * * *—If it shall appear to the Board of Parole from a report by the proper officers of such prison or upon application by a prisoner for release on parole, that there is a reasonable probability that such applicant will live and remain at liberty without violating the laws, and if in the opinion of the board such release is not incompatible with the welfare of society, then the Board of Parole may in its discretion authorize the release of such applicant on parole, and he shall be allowed to go on parole outside of said prison, and, in the discretion of the board, to return to his home, upon such terms and conditions, including personal reports from such paroled person, as said Board of Parole shall prescribe, and to remain, while on parole, in the legal custody and under the control of the warden of such prison from which paroled, and until the expiration of the term or terms specified in his sentence, * * *; and the said board shall, in every parole, fix the limits of the residence of the person paroled, which limits may thereafter be changed in the discretion of the board. * * * (Act of June 25, 1910, c. 387, § 3, 36 Stat. 819, as amended by the Act of May 13, 1930, c. 255, § 1, 46 Stat. 272.)

* * * * *

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[3] Now 18 U. S. C. 4203 (a). See fn. 1, *supra*, p. 93.

18 U. S. C. [1946 ed.] 717.[4] *Same; violation of parole; warrant for retaking prisoner.*—If [the warden of the prison or penitentiary from which said prisoner was paroled or][5] the Board of Parole or any member thereof shall have reliable information that the prisoner has violated his parole, then said [warden][6] at any time

[4] Now 18 U. S. C. 4205 (see fn. 1, *supra*, p. 93), which, however, eliminated certain obsolete provisions of the section as it formerly read (see fns. 5 and 6, *infra*, pp. 95–96).

[5] The bracketed words have been obsolete since June 12, 1930. They have been erroneously retained in successive editions of the United States Code published since that date, to and including the 1946 edition. The origin of the error is explained in the following footnote.

[6] The bracketed word "warden" has been obsolete since June 12, 1930. It should read "board or any member thereof." This error has been repeated in all editions of the United States Code published since that date, to and including the 1946 edition.

This and the error referred to in the preceding footnote are explained as follows:

Section 2 of the Act of June 25, 1910, c. 387, 36 Stat. 819 (this Act being the basic legislation establishing the federal parole system), provided for a separate "board of parole" for each federal penitentiary, consisting of the warden and the physician of the penitentiary and the "superintendent of prisons of the Department of Justice"—the latter official being thus a common member of all boards of parole. Section 4 of the Act (36 Stat. 820) was cast in language virtually identical with the language of above-quoted 18 U. S. C. [1946 ed.] 717.

The Act of May 13, 1930, c. 255, 46 Stat. 272, introduced substantive changes in the parole laws. The three sections of this Act (a fourth section merely designated the effective date of the Act as thirty days after its approval, or June 12, 1930) were inserted in all subsequently published editions of the United States Code, to and including the 1946 edition, as 18 U. S. C. 723a, 723b, and 723c, respectively (see pp. 95–96, *infra*, where these sections are set out in the

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within the term or terms of the prisoner's sentence, may issue his warrant to any

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text). Section 1 of the 1930 Act (18 U. S. C. [1946 ed.] 723a, *infra*, p. 98) created, "in lieu of all existing boards of parole at Federal penal and correctional institutions," "a single Board of Parole to consist of three members to be appointed by the Attorney General * * *." This amendment of the basic law was subsequently reflected in the various Code sections relating to parole, including that now under consideration. Section 2 of the 1930 Act (18 U. S. C. [1946 ed.] 723b, *infra*, p. 98) provided generally for the transfer of all power and authority formerly vested in the several boards of parole to the newly-created Board of Parole. Section 3 of the 1930 Act (18 U. S. C. [1946 ed.] 723c, *infra*, pp. 98–99) provided specifically that the newly-created "board, or any member thereof, shall hereafter have the *exclusive authority* to issue warrants for the retaking of any United States prisoner who has violated his parole" [italics supplied].

Though it is clear that the latter provision introduced a substantive change in the law as contained in § 4 of the basic 1910 Act, the compilers of the successive editions of the Code thereafter published neglected to reword the Code section corresponding to said § 4 (Title 18, § 717, quoted in text, *supra*) so as to indicate the change. By omitting the first bracketed matter, and substituting "board or any member thereof" for "warden," the 1930 amendment is fully reflected in the Code section.

It is to be noted that Section 4205 of the 1948 revision and codification of Title 18 (see fn. 1, *supra*, p. 93) consolidates §§ 717 and 723c of that title of previous editions of the Code and eliminates the obsolete features of § 717 (see Reviser's Note). In addition, Section 4205 omits reference to "reliable information [of parole-violation]" as a condition of the power to issue a retaking warrant. It provides in pertinent part:

"A warrant for the retaking of any United States prisoner *who has violated his parole*, may be issued *only by the Board of Parole or a member thereof* and within the maximum term or terms for which he was sentenced. * * *" [italics supplied].

officer hereinafter authorized to execute the same for the retaking of such prisoner. (Act of June 25, 1910, c. 387, § 4, 36 Stat. 820, as amended by the Act of May 13, 1930, c. 255, § 1, 46 Stat. 272.)

18 U. S. C. [1946 ed.] 718.[7] *Same; officers authorized to execute warrant;* * * *—Any officer of any Federal, penal, or correctional institution or any Federal officer authorized to serve criminal process within the United States, to whom such warrant shall be delivered, is authorized and required to execute such warrant by taking such prisoner and returning him to the custody of the Attorney General. * * * (Act of June 25, 1910, c. 387, § 5, 36 Stat. 820, as amended by the Act of June 29, 1940, c. 449, § 2, 54 Stat. 692.)

18 U. S. C. [1946 ed.] 719.[8] *Same; action by board on issue of warrant; revocation of parole.*—When a prisoner has been retaken upon a warrant issued by the Board of Parole, he shall be given an opportunity to appear before said Board of Parole, a member thereof, or an examiner designated by the Board. The said Board may then, or at any time in its discretion, revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced. (Act of June 25, 1910, c. 387, § 6, 36 Stat. 820, as amended by the Act of May 13, 1930, c. 255, § 1, 46

[7] Now 18 U. S. C. 4206. See fn. 1, *supra*, p. 93.

[8] Now 18 U. S. C. 4207. See fn. 1, *supra*, p. 93.

Stat. 272, and the Act of June 29, 1940, c. 449, § 3, 54 Stat. 692.)

* * * * *

18 U. S. C. [1946 ed.] 723a.[9] *Same; creation of single Board of Parole; membership; appointment; salary.*—In lieu of all boards of parole at Federal penal and correctional institutions existing on June 12, 1930,[10] there is created as of that date a single Board of Parole to consist of three members to be appointed by the Attorney General, at a salary of $7,500 each per annum. (Act of May 13, 1930, c. 255, § 1, 46 Stat. 272.)

18 U. S. C. [1946 ed.] 723b. *Same; power, authority, and duties of Board of Parole;* * * *—All power and authority on June 12, 1930, vested in, and all duties on that date imposed upon, the Attorney General and the several boards of parole existing on that date with respect to the parole of United States prisoners are as of that date transferred to the Board of Parole created by section 723a of this title: * * * (Act of May 13, 1930, c. 255, § 2, 46 Stat. 272.)

18 U. S. C. [1946 ed.] 723c.[11] *Same; violation of parole; warrant for retaking prisoner;* * * *—The Board of Parole created by section 723a of this title, or any member thereof, shall hereafter have the exclusive authority to issue warrants for the

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[9] Now 18 U. S. C. 4201 (see fn. 1, *supra*, p. 93), which, however, increased the number of members of the Board from three to five.

[10] See fn. 6, *supra*, pp. 95–96.

[11] Now consolidated with 18 U. S. C. [1946 ed.] 717, *supra*, pp. 95–97, and codified as 18 U. S. C. 4205. See fns. 4 and 6, *supra*, pp. 95–96.

retaking of any United States prisoner who has violated his parole. * * * (Act of May 13, 1930, c. 255, § 3, 46 Stat. 272.)

B. The Administrative Procedure Act

The Administrative Procedure Act of June 11, 1946, c. 324, 60 Stat. 237, *et seq.*, provides in pertinent part:

SECTION 1. This Act may be cited as the Administrative Procedure Act."

DEFINITIONS

SEC. 2 [5 U. S. C. 1001]. As used in this Act—

(a) AGENCY.—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. * * * Except as to the requirements of section 3, there shall be excluded from the operation of this Act [certain designated types of agencies and functions, none pertinent].

(b) PERSON AND PARTY.—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; * * *

(c) RULE AND RULE MAKING.—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to imple-

ment, interpret, or prescribe law or policy * * *. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) ORDER AND ADJUDICATION.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) LICENSE AND LICENSING.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

(f) SANCTION AND RELIEF.—"Sanction" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; * * * (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. * * *

(g) AGENCY PROCEEDING AND ACTION.—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

PUBLIC INFORMATION

SEC. 3 [5 U. S. C. 1002]. * * *

RULE MAKING

SEC. 4 [5 U. S. C. 1003]. * * *

ADJUDICATION

SEC. 5 [5 U. S. C. 1004]. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing [with six exceptions, none pertinent]—

(a) NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. * * *

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) SEPARATION OF FUNCTIONS.—* * * This subsection shall not apply * * * in any manner to the agency or any member or members of the body comprising the agency.

(d) DECLARATORY ORDERS.— * * *

ANCILLARY MATTERS

SEC. 6 [5 U. S. C. 1005]. Except as otherwise provided in this Act—

(a) APPEARANCE.—Any person compelled

to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. * * *

(b) INVESTIGATIONS.—* * *

(c) SUBPENAS.—Agency subpenas authoried by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. * * *

(d) DENIALS.— * * *

HEARING

SEC. 7 [5 U. S. C. 1006]. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. * * *

(b) HEARING POWERS.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. * * *

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall

constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

DECISIONS

SEC. 8 [5 U. S. C. 1007]. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within the time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision * * *.

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings and conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

SANCTIONS AND POWERS

SEC. 9 [5 U. S. C. 1008]. * * *

JUDICIAL REVIEW

SEC. 10 [5 U. S. C. 1009]. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for * * * habeas corpus) in any court of competent jurisdiction. * * *

(c) REVIEWABLE ACTS.—* * * Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. * * *

(d) INTERIM RELIEF.— * * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * * (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute * * *. In making the foregoing determinations the court shall review the whole record or such portions thereof

as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

EXAMINERS

SEC. 11 [5 U. S. C. 1010]. * * *

CONSTRUCTION AND EFFECT

SEC. 12. [5 U. S. C. 1011]. * * *

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